90-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. _____

BROWER'S MOVING & STORAGE, INC.
Petitioner,

-against-

C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR, as TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can a threshold defense, which goes to the very existence of the obligation to contribute, namely, whether there exists a valid and enforceable collective bargaining agreement between the union and the employer containing the obligation to contribute, be barred in an "ERISA collection action"?

2. Do the District Courts have subject matter jurisdiction under § 301(a) of the Labor Management Relations Act ("LMRA") to adjudicate the validity of collective bargaining agreements or is jurisdiction limited to adjudicating whether a breach of a valid contract has occurred?

3. Do § 515 and § 502(e)(1) of the Employee Retirement Income Security Act ("ERISA") grant the District Courts subject matter jurisdiction to adjudicate the validity of collective bargaining agreements from which the employer's contribution obligation is derived?

4. In the event the District Courts have subject matter jurisdiction under § 301(a) of the LMRA or §§ 515, 502(e)(1) of ERISA to adjudicate the validity of the alleged collective bargaining agreements, are the District Courts nonetheless required to defer to the National Labor Relations Board pursuant to *San Diego Building Trades Council v. J.S. Garmon*, 359 U.S. 326, 79 S.Ct. 773 (1959), on the issue of the agreements' validity and thereby the existence of an obligation to contribute?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Brower's Moving & Storage, Inc.[1] and the respondents C. Victor Benson, Robert Corbett, Arthur Eisenberg, Jeffrey S. Morgan, James O'Connor, as Trustees and Fiduciaries of the Teamsters Local 814 Pension, Annuity and Welfare Funds.

[1]Brower's Moving & Storage, Inc, filing this Petition for a Writ of Certiorari in this case, states that its full name is Brower's Moving & Storage, Inc. and that it has no parent companies, or subsidiaries to list pursuant to U.S. Sup. Ct. Rule 29.1.

TABLE OF CONTENTS

APPENDIX C:

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX D:

MEMORANDUM ORDER OF THE COURT OF APPEALS FOR SECOND CIRCUIT IN NLRB V. BROWER'S MOVING & STORAGE, INC.

TABLE OF AUTHORITIES

Cases **Page**

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The Petitioner, Brower's Moving & Storage, Inc., ("Brower's") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on June 28, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 907 F.2d 310 and is reprinted in Appendix A. The Memorandum Decision and Order of the United States District Court for the Eastern District of New York (Dearie, D.J.) is reported at 726 F.Supp. 31 and is reprinted in Appendix B.

JURISDICTION

Invoking federal jurisdiction under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1132(a)(3), the Respondents ("Funds") brought this suit in the Eastern District of New York alleging unpaid pension, annuity and welfare contributions. On December 4, 1989, the Eastern District granted the Fund's motion for summary judgment.

On appeal, the Second Circuit on June 28, 1990, entered an opinion affirming the Eastern District's judgment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Employee Retirement Income Security Act, § 502(a)(3), (3)(1) & (g)(2), 29 U.S.C.A. § 1132(a)(3), (e)(1) & (g)(2) (West 1985) in pertinent part:

§ 1132, West (1985) Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary ....

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

* * * *

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court

shall award the plan—

(A) the unpaid contributions,
(B) interest on the unpaid contributions,
(C) an amount equal to the greater of—
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (a),
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
(E) such other legal or equitable relief as the court deems appropriate.

ERISA § 515, 29 U.S.C.A. § 1145 (West 1985):

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Labor Management Relations Act, § 301(a), 29 U.S.C.A. § 185 (West 1973):

Suits by and against labor organizations

Venue, amount and citizenship

(a) Suits for violation of contracts between an employer

and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act, § 8(a)(1), (5), 29 U.S.C.A. § 158(a)(1), (5) (West 1973):

(a) Unfair labor practices

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

STATEMENT OF THE CASE[2]

Brower's is a small family owned company which has been engaged in the moving and storage business for approximately forty years.

In the early 1950's Brower's was "persuaded" to recognize Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Union") as the representative of its employees. (A:90.) However, it is not clear whether any Brower's employees, other than the principals of Brower's were signed-up as members of the Union. (A:85, 80.)

Thereafter, a sole Union delegate (no shop steward was ever appointed or designated) serviced the Brower's shop by performing the sole function of collecting dues individually from the Brower's employees until his death in the late 1950's. (A:45, 75.) The Union never replaced the delegate (A:45, 75) and thus left the shop abandoned since the late 1950's. (A:64, 75.)

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[2] The Statement is based upon: a) The Eastern District's Memorandum and Order (Appendix B); b) the findings of the NLRB and its Administrative Law Judge's Decision in *Brower's Moving & Storage, Inc.*, 297 NLRB No. 28, which was submitted to the Eastern District and is part of the record in this case (Appendix C); and c) other relevant documents that were submitted to the Eastern District and are contained in the Joint Appendix that was filed with the Second Circuit. Numbers in parentheses preceded by the letter "A" refer to the page references in the Joint Appendix that was filed with the Second Circuit.

Brower's never negotiated any agreements with the Union.[3] (A:63, 75.) Typically, the Union would mail a stipulation or actual collective bargaining agreement to Brower's which Brower's would simply sign and return. (A:75.) Neither Brower's nor the Union ever complied with the terms of any of the agreements. (A:54 & 76-77.) Indeed, following the death of the sole union delegate, to Brower's knowledge, not even dues were collected. (A:48, 75.)

This pattern of union "abandonment" and Brower's non-compliance continued until sometime in or about 1967. At that time Brower's approached the Union and requested that a sole longtime Brower's employee be put into the Union in order to secure for him health and retirement benefits. (A:75, 80.) Pursuant to a stipulation, Brower's paid both the Union and the Funds a total of approximately twenty thousand dollars to bring the employee current based upon his years of service. (A:80.) Neither the Union nor the Funds inquired regarding other Brower's employees for whom dues and Funds' contributions were due or even regarding general compliance with the Union's alleged agreements. (A:51.)

For the next approximately eleven (11) years, Brower's was never contacted by the Funds nor the Union. In 1981, however, the Funds commenced a state court action against Brower's for delinquent contributions. That action was settled without an audit. (A:64, 76.) At that time neither the Funds

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[3]The Second Circuit made two erroneous conclusions of fact: i) that Brower's "has been a party to collective bargaining agreements with Local 814 since 1951" (Appendix at A-3); and ii) that the 1986-89 contract was signed by the Multiemployer Association in behalf of Brower's. (Appendix at A-7 n.2) The first conclusion is drawn from the erroneous statement of the NLRB (A:65) which is unsupported by the record before it. The second conclusion is contradicted in both the NLRB's ALJ Decision (A:80) and the record before the NLRB.

nor the Union inquired of Brower's whether the alleged collective bargaining agreements which had been ignored by all parties for more than twenty (20) years were being complied with by Brower's.

In or about December 1987—approximately eight (8) years after the settlement and the signing of three (3) additional collective bargaining agreements—the Funds conducted an audit of Brower's books and records and concluded that there was a delinquency of two hundred and thirty-nine thousand six hundred thirty-nine dollars and thirty cents ($239,639.30) for the period from April, 1983 through December, 1987 based upon Brower's alleged collective bargaining documents obligations. (A:78.) The Funds' demanded payment of the alleged delinquency which Brower's refused to pay. (*Id.*)

The Funds commenced the within collection action against Brower's in the United States District Court for the Eastern District of New York for the allegedly unpaid contributions based upon the existence and enforceability of the 1983-86 and 1986-89 collective bargaining agreements.[4] (A:1-4.)

Brower's asserted that a condition precedent to any recovery by the Funds was an adjudication of both the validity and enforceability of the alleged collective bargaining agreements and that the National Labor Relations Board ("NLRB") was the proper forum, not the Eastern District. (A:8.) Brower's further contended that: (a) under then existing precedents, the issue of the collective bargaining agreements' validity was

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[4] The Second Circuit erroneously concluded that Brower's was bound to the 1986-89 agreement through the Moving & Storage Association (Appendix at A-7 n.2). In fact, Brower's was never a member of any multiemployer association. (A:75 & 80.) Note further, that the Funds did not plead that Brower's was bound to the alleged agreements as a member of the Association. (A:1-4.)

beyond the Eastern District's specific grant of subject matter jurisdiction under § 301(a) of the LMRA to the extent that the issue before the court was the existence of the agreements and not whether they were breached, and (b) the Eastern District should have deferred to the NLRB on the issue of whether the contracts were valid and enforceable pursuant to this Court's *Garmon* Doctrine.

To invoke the NLRB's jurisdiction Brower's filed an election petition to test the validity of the 1986-89 contract under the NLRB's contract-bar rule.[3] (A:52-60.) But the Union blocked the processing of the election petition by filing an unfair labor practice charge under § 8(a)(1) & (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C.A. § 158(a)(1) & (5) (West 1978), ironically charging Brower's with refusing to bargain with the union it had not heard from for approximately twenty (20) years. (A:74.)

The Funds then moved for summary judgment contending that Brower's failed to assert any cognizable defense to the collection action and that, as a matter of law, Brower's defenses were unavailable to employers in ERISA actions. The motion was submitted to the Eastern District for consideration on September 30, 1988.

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[3] The NLRB's contract-bar rule precludes any challenge to the majority status of an incumbent union with a collective bargaining contract prior to ninety (90) days before the existing contract is scheduled to expire, *Deluxe Metal Furniture, Co.*, 121 NLRB (No. 135) 995, 52 LRRM 1473 (1958), as modified by *Leonard Wholesale Meats, Inc.*, 136 NLRB (No. 103) 1000, 49 LRRM 1901 (1962), unless, of course, the contract is declared invalid. This is a means of testing the majority status of a union and thus the enforceability of the alleged contract. *See, Austin Powder Co.*, 201 NLRB (No. 90) 566, 82 LRRM 1272 (1973) (No intention to be bound by agreement.); *Paramount Press, Inc.*, 187 NLRB (o. 65) 586, 76 LRRM 1069 (1970) (Contract was abandoned and unenforceable.); *Silver Lake Nursing Home*, 178 NLRB (No. 71) 478, 72 LRRM 1141 (1969) (NLRB refused to enforce the terms of the agreement based upon longterm and substantial noncompliance.)

Before the Eastern District decided the motion, a full evidentiary hearing was held before an Administrative Law Judge of the NLRB on the Union's refusal to bargain charge. The Administrative Law Judge held that the NLRB's General Counsel failed to establish that the Union represented the majority of the Brower's employees and thus rendered the alleged collective bargaining agreement unenforceable. (A:81.) In the alternative, the ALJ held that the Union had long abandoned the collective bargaining relationship. (A:81 n.3.) He therefore recommended that the NLRB dismiss the General Counsel's complaint. (A:82.) The NLRB subsequently rejected the ALJ's legal conclusions and declared the 1986-89 collective bargaining agreement valid. *Brower's Moving & Storage, Inc.*, 297 NLRB No. 28 (1989).[6] (See Appendix C.)

On December 4, 1989, the Eastern District filed its Memorandum and Order granting the Fund's motion. In essence, the Eastern District rejected any connection between the proceedings before the NLRB and the Funds' action to collect contributions based upon the alleged collective bargaining agreements. Appendix at B-13 n.5. The Eastern District concluded that Congress precluded any employer defenses pertaining to the validity of the underlying collective bargaining agreement with the Union in an action brought by the Union's Funds. (Appendix at B-6,7.) (A:95.) A judgment and supplemental judgment were subsequently filed.

The United States Court of Appeals for the Second Circuit affirmed the judgment and legal conclusions of the Eastern

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[6] On August 29, 1990 the Second Circuit granted the NLRB's petition for enforcement of its Order in an unpublished memorandum order. Brower's intends to petition this Court for a Writ of Certiorari to the Second Circuit. A copy of the Second Circuit's Order is contained in Appendix D.

District.

The Second Circuit held that § 515 of ERISA limited the employer's defenses to instances where the contributions themselves are illegal or the collective bargaining agreement itself is void "(not merely voidable)". Accordingly, pursuant to the provisions of ERISA, particularly § 515 (29 U.S.C. § 1145), and Congress' intent to ensure the expedited collection of benefit fund contributions from recalcitrant employers, the ERISA benefit fund—the third-party beneficiary to the alleged collective bargaining agreements between a union and an employer—is "in a position superior to the original promisee, analogous to a holder in due course." (Appendix at A-10.)

Because the Second Circuit held that Brower's was limited to only two inapposite defenses, it was unncessary for it to address the issues concerning the extent of § 301(a)'s jurisdiction and the confluence of the labor and pension laws—whether the Eastern District should have deferred to the NLRB. Simply put, such defenses are beyond consideration in an ERISA collection case.

Nonetheless, the Second Circuit saw conflict resulting from its decision because it advised Brower's to seek equitable relief in the Eastern District should another Second Circuit panel reject the NLRB's petition for enforcement. (Appendix at A-15.) Again, simply put, the Second Circuit recognized that its conclusions are harsh and could result in inconsistent rulings from the same court on the same issue, but that its hands were tied by the prevailing construction of ERISA in fellow courts of appeals.

REASONS FOR GRANTING THE WRIT

POINT I

AS ENACTED, ERISA WAS NEVER INTENDED TO BAR EMPLOYERS FROM ASSERTING THE DEFENSE THAT THERE IS NO VALID AND ENFORCEABLE CONTRACT CONTAINING AND ESTABLISHING THE OBLIGATION TO CONTRIBUTE.

In its Opinion, the Second Circuit held that ERISA barred Brower's defenses which contended that the existence of the obligations under ERISA were dependent upon the existence of a valid agreement: "...Brower's is not released from its obligation to contribute to the Funds because 'nothing in ERISA makes the obligation to contribute [to a benefit plan] depend on the existence of a valid collective bargaining agreement.' *Gerber Truck,* 870 F.2d at 1153." Appendix at A-12. The Second Circuit further concluded that since the defenses going to the validity of the contract were barred, the issue of the Union's majority status—a condition precedent to the validity and enforceability of the alleged agreements under the NLRA—was not relevant. Appendix at A-11.

According to the Second Circuit, "once an employer knowingly signs an agreement that requires him to contribute to an employee benefit plan, he may not escape his obligation by raising defenses that call into question the union's ability to enforce contracts as a whole." Appendix at A-10. The court contends that its holding is merely consistent with the Congressional objective of ensuring that " 'employers who enter into agreements providing for pension contributions not be

permitted to repudiate their pension promises.' " Appendix at A-12, *quoting*, Rep. Thompson, 126 Cong. Rec. 23, 039 (1980).

However, the Second Circuit, along with other courts of appeals, has gone beyond Congress' intent to facilitate the expeditious collection of legitimate delinquencies from recalcitrant employers through the elimination of extraneous defenses and created a new class of obligors to ERISA funds, namely, employers whose "contracts" were (a) never intended to create such obligations, (b) whose contracts are not recognized by the NLRB as valid collective bargaining agreements, and (c) who are precluded from challenging the agreements' enforceability because of the particular forum in which they find themselves.

The creation of a new class of defenseless obligors through the elimination of the relevancy of the agency charged with the primary jurisdiction for resolving such issues, is an important issue of federal law "which has not been, but should be settled by this Court...." U.S. Sup.Ct. Rule 10.1(c).

The Second Circuit's holding is a significant departure from the plain meaning of the statute to the extent that the elimination of the normally attendant third-party beneficiary defenses is premised on Congress' intent to expedite the collection of delinquent obligations *even though* the cited statute, ERISA § 515, makes no explicit or implicit reference to such an intent as it was enacted. Instead, the Second Circuit relied upon Representative Thompson's general and ambiguous remarks that Congress sought to ensure that all participants and those obligated to contribute neither suffer for nor bear the costs of recalcitrant employers who fail to timely meet

their obligations. (Appendix at A-12, 13.)

Brower's contentions, however, are consistent with the specific language and intent of ERISA § 515, namely, where an employer is obligated to make contributions, the extraneous defenses used as dilatory tactics are barred. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489 (1960); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S.Ct. 851 (1982). Indeed, the statute is premised on the existence of an obligation, an element of the plaintiff's *prima facie* case which must first be established before the limitations of ERISA are available. It would be incongruous for the statute which requires the existence of a "plan" or "agreement" establishing the obligation as a condition precedent to invoking its remedies to deny the defenses addressing the existence of that condition precedent.

Accordingly, the Second Circuit's construction of the statute's expediting intentions is erroneous and creates a harsh result. Congress could not have intended to force those employers who are not obligated, (because there is in effect no contract) to *ipso facto* become obligors by denying them the opportunity to establish that there is no contractual nexus to the ERISA fund. But the Second Circuit's expansive reading of the Congress' intent not only forces the recalcitrant employer to conform its conduct to the agreed upon obligations (as Congress intended), but forces employers who never agreed to the obligation to nonetheless comply. This result is inconsistent with *Laborers Health & Welfare Trust Fund, Etc. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 106 S.Ct. 830, 835 & n. 14 (1988), which held that the intent of the legislation was to impose a statutory duty to contribute on employers who were already obligated to contribute

through their contractual promises. The intent of the legislation could never have been to preclude the employer from establishing that the promise did not exist.

The Second Circuit's construction of the statute is both inconsistent with the plain meaning of the statute and an unwarranted extension of Congress' intent. Moreover, the Second Circuit acknowledges that its construction of the statute and the result "in this and similar cases may seem quite harsh." (Appendix at A-14). But only because of the Second Circuit's erroneous interpretation of Congress' intent is the result improperly harsh. This Court should therefore grant this petition to review the Second Circuit's judgment. *See e.g., Montana v. Kennedy,* 366 U.S. 308, 309, 81 S.Ct. 1336, 1336 (Certiorari granted "in view of the apparent harshness of the result obtained.")

POINT II

THE SECOND CIRCUIT ERRED IN HOLDING THE NLRB'S PROCEEDINGS IRRELEVANT TO THE DISPOSITION OF THE VALIDITY AND ENFORCEABILITY OF THE ALLEGED COLLECTIVE BARGAINING AGREEMENTS.

The Second Circuit recognizes the harshness of this result to the extent that an employer is obligated to ERISA funds on the basis of a "contract" which the NLRB may reject, but could provide no alternative because it was confined by the precedents of other courts which have previously interpreted Congress' intent. Appendix at A-10; *See Central States, Southeast & West Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*); *Bitumi-*

nous Coal Operators' Assoc., Inc. v. Connors, 867 F.2d 625 (D.C. Cir. 1989). It is therefore necessary for this Court to review these conclusions, namely, what Congress intended and what the statute permits. U.S. Sup.Ct. Rule 10.1(c).[7]

Furthermore, in reaching its conclusion, the Second Circuit did not address or reconcile the anamoly that as a result of an unfair labor practice hearing, the NLRB may conclude that the alleged contract is unenforceable and the Union cannot enforce the contract's pension and welfare obligations, but the Funds, in a federal district court, can. The NLRB has held that "in finding that the Union had not established its majority status, it follows that the Respondent [Employer] was under no *contractual* obligation to pay the Union, health, welfare and pension monies." *Ace-Doran Hauling & Rigging Co.*, 171 NLRB (No. 88) 645 n.3, 68 LRRM 1298, 1299 n.3 (1968). (emphasis added.)

Thus, according to the result in this case, the NLRB may conclude that a union may not enforce the alleged ERISA obligations because there is no contract supported by a majority of the employer's employees, while the third-party beneficiary to the very same unenforceable contract can enforce the alleged ERISA obligations presumably because the same contract does exist! Even though the alleged employer is no longer a statutory or contractual employer in the eyes of the NLRB, the federal courts will be blinded to that fact and permit the ERISA funds to collect contributions for "employees" who are not covered by a collective bargaining agreement.[8] *See also, J.S. Griffith Constr. Co. v. United Brotherhood of*

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[7] Neither *Gerber* nor *Connors* sought U.S. Supreme Court review.

[8] The scenario can be taken one step further. The same Second Circuit which permits a funds' enforcement action may also uphold an NLRB cease and desist order *precluding* the funds' union from enforcing the very same contract.

Carpenters, Etc., 785 F.2d 706, 711 (9th Cir. 1986 (Objective is the uniformity of the labor laws even to the extent of sometimes entertaining claims otherwise pre-empted by the primary jurisdiction doctrine.)

The Second Circuit's reasoning renders the NLRB's function in determining the validity and enforceability of collective bargaining agreements irrelevant to a union's fund's attempt to enforce the terms of that contract. For example, were the NLRB to issue an order to an employer to cease and desist from complying with the terms of a union agreement because it violated § 8(a)(2) of the NLRA, 29 U.S.C.A. § 158(a)(2) (West 1973), it would necessarily follow that the union's ERISA funds would be exempt from such an order and may enforce the alleged agreement so long as they sought relief in a federal forum under ERISA. According to the Second Circuit, the fact such enforcement by a federal district court is improper is of no consequence because the ERISA statute precludes the federal court from considering such issues. *See Int'l Ladies Garment Workers Union, AFL-CIO v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 81 S.Ct. 1603 (1961). (Enforcing NLRB order that employer should cease and desist from enforcing a union's labor agreement which did not have majority support.)

It is apparent that the Second Circuit's construction of Congress' intent in eliminating long and drawn out delinquency collection actions goes beyond ERISA's stated objective of ensuring pension solvency because the collections have no nexus to contracts and to employees covered by a collective bargaining agreement's fund entitlements. The holding eviscerates basic tenets of long-established labor and contract law: only a party to a collective bargaining agreement

can be forced to comply with its terms. *See* Appendix at A:7 and 14, *citing Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830 (1988). Now the determinations of the agency with the primary responsibility for adjudicating the validity and enforceability of said collective bargaining agreements have been relegated to irrelevancy. *See San Diego Building Trades Council v. J.S. Garmon*, 349 U.S. at 244-45, 79 S.Ct. at 779. (The NLRB has "exclusive primary competence" and therefore jurisdiction to address the issues governed by § 8 of the NLRA.)

The irony here is that federal courts will look to the NLRB to establish ERISA-based liability as a result of a post-contract unfair labor practice under NLRA § 8(a)(5), 29 U.S.C.A. § 158(a)(5) (West 1973), *Laborers Health & Welfare Trust Fund, Etc. v. Hess*, 594 F.Supp. 273, 279-80 (N.D. Calif. 1984), but not for eliminating or disposing of such liability as the instant case amply demonstrates.[9] Since the federal courts will look to the NLRB in assessing an employer's post-contract liability under ERISA, there is no sound reason why they should not look to the NLRB for an initial determination of whether a contract containing such an obligation even exists.

In sum, the Second Circuit erred by concluding that the

[9] This fact brings into question the Second Circuit's assertion that employer liability is limited to the terms of the contract to the extent that under NLRB precedents it is an unfair labor practice to cease making contributions after the contract expires without first negotiating with a union. Appendix at A-14. Thus the limitations imposed under ERISA do not prevent the union itself obtaining post-contract relief before the NLRB. *See Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970) (Employer directed to make post-contract benefit contributions.); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981) (Employer must negotiate the cessation of contributions in post-contract period.); *e.g. Turnball Enterprises, Inc.*, 259 NLRB (No. 122) 934, 940; 109 LRRM 1069 (1982).

NLRB's judgement in addressing the validity and enforceability of the underlying alleged collective bargaining agreement is irrelevant.

POINT III

THE PRECEDENTS RELIED UPON BY THE SECOND CIRCUIT ARE BOTH CONTRARY TO AND UNWARRANTED EXTENSIONS OF THIS COURT'S PRECEDENTS.

The two cases upon which the Second Circuit's opinion primarily relied, *Central States, Southeast & West Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) and *Bituminous Coal Operators' Assoc. v. Connors*, 867 F.2d 625 (D.C. Cir. 1989) were not reviewed by this Court. Thus, the issues presented here are before this Court for the first time. Further, the confluence of the long-established principles of the labor laws with the more recent pension laws should be clarified and settled by this Court. U.S. Sup. Ct. Rule 10.1(c).

The decision in the instant case illogically expands prior case law well beyond this Court's holding in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489 (1960). *Lewis* held that *breaches* of contracts by a union could not be used as a defense or set-off by employers to reduce or eliminate the employer's obligations to the union's funds. This Court's decision in *Lewis* is now being erroneously extended by the courts of appeals to eliminate the employer's opportunity to assert that it has no fund obligation because there is no contract.

Although Congress, in drafting ERISA, may have consid-

ered additional means for expediting the collection of fund delinquencies from recalcitrant employers, it did not enact them into the final legislation. The only clearly mandated means of expediting the collection of delinquencies is the imposition of the fees and penalties contained in ERISA's § 502(g)(2), 29 U.S.C.A. § 1132(g)(2) (West 1985). This motivates the recalcitrant or dilatory employer (the employer who recognizes its obligation to contribute) to pay promptly based upon the additional fees and penalties which the courts are required to impose pursuant to judgments under ERISA § 502(g)(2). *See Laborers Health & Welfare Trust Fund, Etc. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548 n.15, 108 S.Ct. 830, 835 n.15. There are no other provisions of ERISA which either explicitly or implicitly offer evidence of any other expediting mechanism.

The simple fact is that the only incentive to a quick settlement of ERISA disputes is the avoidance of any judgments. This incentive comports with Congress' intent to ensure the prompt payment of contributions to maintain the solvency of the funds through the avoidance of drawn out judicial proceedings leading to "judgments". Only a few courts, but not the U.S. Supreme Court, have reached backed into the recesses of the Congressional record to conclude that "expediting" also means the evisceration of legitimate defenses employers may have to the existence of the basic obligation itself.

The issue of Congress' intent warrants review by this Court because the Second Circuit has "decided an important question of federal law which has not been, but should be settled by" the U.S. Supreme Court and is in conflict with principles of law and precedents of the Court. U.S. Sup.Ct. Rule 10.1(c).

POINT IV

THERE IS A CONFLICT AMONG THE LOWER COURTS WHETHER § 301 (a) PERMITS THE FEDERAL COURTS TO ADJUDICATE THE EXISTENCE OF THE CONTRACT AS OPPOSED TO ONLY WHETHER A VALID CONTRACT HAS BEEN BREACHED.

In its opinion, the Second Circuit did not directly address the issue of § 301(a) jurisdiction because it concluded that defenses going to the validity of the contract were barred in an ERISA action.[10] The Second Circuit did, however, affirm the Eastern District which explicitly addressed the issue and then deemed the issue to be without merit on appeal. There is clearly a conflict among the courts of appeals on the jurisdictional issue which this Court should resolve. U.S. Sup.Ct. Rule 10.1(a).

It is undisputed that there must be three facts present to establish subject matter jurisdiction under §301(a). There must be (1) a claim of violation of (2) a contract (3) between an employer and labor organization. *Alvares v. Erickson,* 514 F.2d 156, 161 (9th Cir.), *cert. den.*, 423 U.S. 874, 96 S.Ct. 143 (1975). In the absence of any one of the three essential elements, the district court is obligated to dismiss the action for a lack of subject matter jurisdiction.

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[10] Brower's argued that the Funds' action was brought unter both § 301(a) of the LMRA and § 515 of ERISA with the Funds thereby setting the table for the litigation. If § 301(a) is applicable to adjudicating the existence of the contract, then it necessarily follows that all of Brower's defenses—abandonment, non-majority status, NLRB primary jurisdiction—are available. Appellant's Second Circuit Brief at 40. The fact that ERISA is also pleaded does not bar the defenses available under the alternate basis for jurisdiction. To eliminate the defenses, the Funds should have brought their action solely under ERISA. *Id.* See Point V, *infra.*

The Eastern District held that § 301(a) was not to be read literally, but broadly to include claims where the very existence of the agreement, not just whether it was breached, was at issue. (Appendix at B-9.) Such a holding is in conflict with *John S. Griffith Construction Co. v. Southern Calif. Cement Masons, Etc.*, 607 F.Supp. 809, 813 n.1 (C.D. Cal. 1984) where the court held that it could not adjudicate the dispute before it under § 301(a) because "the dispute is not focused on the contract terms, but upon whether the contract exists."[11]

The Central District was merely following the rule established in *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1343 (9th Cir. 1982) in which the employers' § 301 action was rejected because they were "not seeking to interpret the terms of the collective bargaining agreement [ie: whether a breach occurred], but rather to avoid the entire agreement." In fact, the Ninth Circuit held that the issues raised by the employers as a defense to the validity of the contract, namely, the union's majority status, was for the NLRB to adjudicate under the *Garmon* Doctrine. *Id.* at 1344-45.

The courts of appeals are in conflict on this issue. The Second Circuit only *sub silentio* joins those circuits approving the expansive construction of § 301(a), because only the Eastern District directly ruled on the issue. The following courts of appeals have accepted the expansive reading of § 301(a): *IBEW, Local 418 v. Sign Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inv. v. Int'l Union, UAW*, 856 F.2d 579 (3d Cir. 1988), *cert. den.*, —U.S.—, 109 S.Ct. 1316 (1989),

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[11] The Court should focus on the plain language of the statute where there is no ambiguity. *See Patterson v. McLean Credit Union*, —U.S.—, 109 S.Ct. 2363, 2372 (1989).

but see, Leskiw v. Local 1470, IBEW, 464 F.2d 721 (3d Cir.), *cert. den.,* 409 U.S. 1041, 93S.Ct. 526 (1972). In addition to *Custom Auto Glass,* the following courts of appeals have held that § 301(a) is limited to breaches of contracts and not whether the contract exists: *Huessner v. Nat'l Gypsum Co.,* 887 F.2d 672, 675-677 (6th Cir. 1989); *A.T. Massey Coal Co., Inc. v. Int'l Union, UMW,* 799 F.2d 142 (4th Cir. 1986), *cert. den.,* 481 U.S. 1033, 107 S.Ct. 1964 (1987); *Hernandez v. Nat'l Packing Co.,* 455 F.2d 1252 (1st Cir. 1972).

POINT V

THE EMPLOYER IS NOT BARRED FROM ASSERTING DEFENSES AVAILABLE UNDER § 301(a) SIMPLY BECAUSE THE PLAINTIFF SIMULTANEOUSLY PLEADS SUBJECT MATTER JURISDICTION UNDER BOTH ERISA AND § 301(a).

After holding that § 301(a) provides the federal courts with the requisite subject matter jurisdiction to adjudicate the existence of the agreement (*see* Point IV *supra*), it is ironic that the Eastern District then ruled that the limitations on defenses established under the statutory framework of ERISA, in effect, preempted the precedents and practices under § 301(a) because Brower's defenses were barred in the "hybrid" § 301(a) and ERISA action. Thus, the defenses which are available to an employer in a § 301(a) action, which is also an unfair labor practice under the National Labor Relations Act, are now barred if the union or the fund is prescient to the fact that ERISA should also be pleaded.

However, this conclusion is inconsistent with the holding in

Carpenters Local Union No. 1846 v. Pratt-Fransworth, Inc., 690 F.2d 489 (5th Cir. 1982) that under § 301(a) the courts were to apply a form of federal common law incorporating the NLRB's law and precedent:

> [W]e think that it would be inconsistent with the congressional mandate to fashion the law under section 301 from the policy of our national labor laws to say that the policies found controlling in the unfair labor practice context ... may be disregarded by the district court in the present suit under section 301 and thus to permit the rights and obligations of the parties to vary with the forum.

Id. at 513.

The law on this issue remains unsettled among the courts of appeals to the extent that (a) they differ on whether there is federal court subject matter jurisdiction under § 301(a) to adjudicate the existence of a collective bargaining agreement and (b) whether the presence of an ERISA claim in the same action alters the established application of NLRB precedents in a § 301(a) action. Should the courts continue to ignore the NLRB precedents, it will result in inconsistent conclusions concerning the existence of collective bargaining agreements depending on the forum in which the adjudication takes place.

POINT VI

THE LOWER COURTS ERRED IN HOLDING THAT THE FEDERAL COURT MAY ADJUDICATE THE VALIDITY AND ENFORCEABILITY OF A COLLECTIVE BARGAINING AGREEMENT UNDER ERISA.

The alternative ground cited by the Eastern District for its authority to adjudicate the validity of the alleged collective bargaining agreements between Brower's and the Union is ERISA § 502(e)(1), 29 U.S.C.A. § 1132(e)(1) (West 1985). (Appendix at B-8.)[12] However, the cited provision does not address the issue of the court's subject matter jurisdiction to adjudicate validity issues. In fact, ERISA § 502(e)(1) begs the question to the extent that the Eastern District's jurisdiction to hear ERISA collection cases, enforce valid obligations and assess the attendant penalties (ERISA § 502(g)) is unquestioned. Rather, the issue is whether ERISA § 502(e)(1), which merely provides for federal court jurisdiction if the conditions of ERISA § 515 are met, namely, there is a "plan" or "terms of a collective bargaining agreement", also permits the court to adjudicate the existence of the condition precedent to its jurisdiction—a plan or contract. The Eastern District's reliance upon ERISA § 502(e)(1) as authority to adjudicate the validity of the alleged collective bargaining agreements begs the question.

ERISA does not provide a mechanism or a grant of "jurisdiction" to affirmatively test an agreement's validity. Indeed, ERISA presumes the existence of a valid and enforceable plan

[12] The Eastern District also erroneously cited to ERISA § 502(g), the penalty provision, as a source of jurisdiction to adjudicate a collective bargaining agreement's validity. Appendix at B-19.

or agreement. *See Laborers Health & Welfare Trust Fund, Etc. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 458-49 notes 15-16, 108 S.Ct. 830, 834-36 notes 15-16 (1988). (Section 515 expresses the employer's contractual obligations.) Accordingly, the Eastern District's holding that jurisdiction exists, affirmed by the Second Circuit, is erroneous. In effect, the Eastern District established a new precedent whereby the federal court may adjudicate the validity of collective bargaining agreements under § 502(e)(1) of ERISA. In effect, this renders the NLRB's determination on the issue of the agreement's validity irrelevant despite both Congress' mandate and this Court's deference to the NLRB to adjudicate such issues. *See* § 8(a)(5) of the NLRA and *San Diego Building Trades Council v. J.S. Garmon, supra.*

In sum, this matter of federal law for this Court to settle. U.S. Sup.Ct. Rule 10.1(c).

CONCLUSION

Brower's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted to resolve the following:

a) whether ERISA was intended to bar employers from asserting defenses addressing the validity and enforceability of the alleged underlying agreement between the employer and union;

b) whether the NLRB's disposition of the issue of the alleged contract's validity and enforceability in an unfair labor practice proceeding is irrelevant for purposes of the benefit funds' action in federal district

court or whether the federal courts should defer to the NLRB under this Court's *Garmon* Doctrine;

c) whether precedents relied upon by the Second Circuit are inconsistent with or are unwarranted extensions of this Court's precedents;

d) the conflict among the circuit courts of appeals on whether § 301(a) of the LMRA establishes federal district court subject matter jurisdiction to decide anything other than whether a breach of a collective bargaining agreement has occurred; and

e) whether the provisions of ERISA establish federal district court jurisdiction to adjudicate the validity and enforceability of the employer's and union's collective bargaining agreement.

Dated: Carle Place, New York
September 24, 1990

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1154—August Term, 1989

(Argued April 20, 1990 Decided June 28, 1990)

Docket No. 90-7001

C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR AS TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,

Plaintiffs-Appellees,

—v.—

BROWER'S MOVING & STORAGE, INC.,

Defendant-Appellant.

Before:

TIMBERS, MESKILL and PIERCE,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Dearie, *J.*, granting plaintiffs' summary judgment

motion and ordering defendant to make unpaid pension contributions required by a collective bargaining agreement.

Affirmed.

ROBERT S. NAYBERG, Carle Place, NY (Martin H. Scher, Carle Place, NY, of counsel), *for Appellant*.

MICHAEL BARRETT, New York City (Eugene S. Friedman, Jay P. Levy-Warren, Friedman & Levy-Warren, New York City, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

In this appeal we consider the defenses available to an employer sued by a union pension fund for delinquent pension contributions. The individual plaintiffs are trustees of the Teamsters Local 814 Pension, Annuity and Welfare Funds (the Funds), which are multiemployer employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA). Defendant Brower's Moving & Storage, Inc. (Brower's) is an employer required by the terms of a collective bargaining agreement with Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers ("Local 814" or "the union"), to make contributions on behalf of Brower's employees to the Funds. The Funds brought this action against Brower's pursuant to section 301 of the Labor Manage-

ment Relations Act (LMRA), 29 U.S.C. § 185, and sections 502(a)(3) and 515 of ERISA, 29 U.S.C. §§ 1132(a)(3), 1145, to recover delinquent contributions. Brower's maintained, *inter alia*, that it had no obligation to make the contributions because Local 814 had abandoned the collective bargaining agreement. The Funds moved for summary judgment before the United States District Court for the Eastern District of New York, Dearie, *J.* The district court granted the motion and ordered Brower's to make the delinquent contributions, holding that section 515 of ERISA precludes Brower's from raising the union's abandonment of the collective bargaining agreement as a defense against the Funds. *See* 726 F.Supp. 31 (E.D.N.Y. 1989). The court entered judgment in favor of the Funds, and Brower's appeals.

We affirm.

BACKGROUND

The relevant facts are not in dispute. Brower's has been a party to a series of collective bargaining agreements with Local 814 since 1951. The two agreements relevant to this dispute covered the periods from April 1, 1983 through March 31, 1986, and from April 1, 1986 through March 31, 1989. Each agreement required Brower's to contribute to the Funds on a monthly basis to pay for pension, annuity and welfare benefits for employees covered by the agreements.

An audit conducted by the Funds in December 1987 revealed that Brower's had made no contributions from April 1983 through September 1987 for twelve employees covered by the agreements, resulting in a deficiency

of $239,639.30.[1] Brower's did pay union dues and make pension contributions during this period for two Brower's family members. Brower's refused to honor the Funds' requests for payment of the deficiency, and the Funds commenced this action in February 1988 to recover the unpaid contributions.

The Funds subsequently moved for summary judgment on the basis that the delinquencies were established and that ERISA section 515 precludes Brower's from asserting contract defenses in a benefit plan collection action. Brower's responded with a two-part defense. First, it contended that a valid collective bargaining agreement is a jurisdictional prerequisite to liability under section 515, and that the collective bargaining agreements with Local 814 were invalid and unenforceable because they had been "abandoned" by the union, *i.e.*, Brower's had not complied with several terms of the agreements and the union had acquiesced in the noncompliance. Therefore, Brower's asserted, it had no liability to the Funds. Second, Brower's maintained that the district court had no jurisdiction to decide this preliminary question of the validity of the collective bargaining agreements, and therefore the action had to be dismissed.

The district court granted the Funds' motion, holding that (1) abandonment amounts to a defense going to the enforceability of the contract, and contractual defenses available against a union may not be raised against a

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1 The district court stated that the present dispute involves only the collective bargaining agreement for the period April 1983 through March 1986. 726 F.Supp. at 32. The period of delinquent contributions, however, extends from April 1983 through December 1987. Thus, the collective bargaining agreement running from April 1986 through March 1989 also is relevant.

benefit plan by virtue of section 515 of ERISA, and (2) even if such defenses could be raised, a district court has jurisdiction to determine the validity of a collective bargaining agreement under LMRA section 301(a), 29 U.S.C. § 185(a). The court then opined that the 1983-1986 contract is valid, but expressed no opinion on the 1986-1989 contract.

On October 11, 1988, eight months after the Funds commenced this action, Local 814 filed an unfair labor practice charge against Brower's with the National Labor Relations Board ("NLRB" or "the Board"). The union alleged that Brower's had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1), 158(a)(5), by repudiating its 1986-1989 contract with the union. Specifically, the union asserted that Brower's had failed to make contributions to the Funds and had failed to comply with other contract terms regarding wages, holidays, vacations and union security. Brower's argued that no contract existed between it and the union, that even if a contract did exist, it had been abandoned by Local 814, and that if no abandonment had occurred, the union was estopped from enforcing the contract after failing to enforce any of the collective bargaining contracts with Brower's since 1951. The Administrative Law Judge (ALJ) who heard the case ruled in favor of Brower's, concluding that the 1986-1989 contract did not give rise to a presumption of majority status (a prerequisite to a section 8(a)(5) violation) because Brower's and the union had not maintained a true collective bargaining relationship over the years. Alternatively, the ALJ ruled that Local 814 had abandoned the contract by not enforcing its terms.

A three member panel of the NLRB disagreed, finding "that since 1951, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit described in the complaint, which we find appropriate for collective bargaining, and that the Union has been recognized as such by [Brower's]." It further found "that the 1986-1989 contract is valid and gives rise to an irrebuttable presumption of majority status and that the Union has not abandoned its administration of the contract." *Brower's Moving & Storage*, 297 N.L.R.B. No. 28 (Nov. 8, 1989). The panel then found that, since April 11, 1988, Brower's had violated sections 8(a)(1) and 8(a)(5) of the NLRA, and ordered Brower's to comply with the collective bargaining agreement and to make restitution for past violations. The Board did not order relief for the period before April 11 because NLRA section 10(b), 29 U.S.C. § 160(b), bars relief based on unfair labor practice charges filed more than six months after the occurrence. The NLRB's petition for enforcement of its order is currently pending before another panel of this Court.

The district court was aware of these administrative proceedings and the NLRB's decision, but regarded the NLRB's decision as irrelevant to the issue whether section 515 of ERISA permits Brower's to raise the validity of its collective bargaining agreements as a defense against the Funds.

DISCUSSION

On appeal, Brower's again argues that it has no liability to the Funds because no valid collective bargaining agreement exists. Specifically, Brower's raises the defenses of abandonment of contracts and lack of

majority representation. We conclude that neither defense is available to Brower's.

We begin our analysis by noting that ERISA sections 502 and 515 clearly give a district court subject matter jurisdiction to hear an action brought by benefit plan trustees to enforce an employer's promise to make contributions. *See* 29 U.S.C. §§ 1132(e)(1), 1145; *see also Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547 (1988) ("The liability created by § 515 may be enforced by the trustees of a plan by bringing an action in federal district court pursuant to § 502."). Of course, the benefit plan must prove that the employer promised to contribute to the plan in order to succeed on its claim. In this case, the Funds satisfied this requirement by producing collective bargaining agreements that Clifford Brower, the Secretary and Treasurer of Brower's, admittedly signed.[2] Viewed in this light, Brower's argument is that, as soon as an employer raises the defense of abandonment or lack of majority status, the district court is deprived of subject matter jurisdiction because it must defer to the NLRB on the question of the contract's validity. Brower's thus raises the same cry as countless other employers across the country: "Why must I contribute to a benefit plan when no 'real' collective bargaining agreement exists?" The short answer, and the one we find dispositive, is that Congress intended to insulate benefit plans from exactly these defenses in adding section 515 to ERISA. Accordingly, we need not reach Brower's second argument that the district court

2 Clifford Brower signed the 1983-1986 contract and a Memorandum of Agreement dated February 18, 1986, by which Brower's agreed to be bound by the 1986-1989 contract. The 1986-1989 contract was signed by the Employers Association of the Moving and Storage Industry on behalf of individual employers, including Brower's.

erred by not deferring to the ongoing NLRB proceedings on the question of validity.

A. *Enactment and Interpretation of Section 515*

Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. The reasons underlying the enactment of section 515 are clear, and we are not the first court to explore them. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1152-54 (7th Cir. 1989) (in banc); *Bituminous Coal Operators' Assoc., Inc.* v. *Connors*, 867 F.2d 625, 632-34 (D.C. Cir. 1989); *Southwest Administrators, Inc.* v. *Rozay's Transfer*, 791 F.2d 769, 773-75 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). Accordingly, we will discuss the relevant case law and legislative history only briefly.

The Funds occupy the position of a third party beneficiary of the collective bargaining agreement between Brower's (promisor) and Local 814 (promisee). *Robbins* v. *Lynch*, 836 F.2d 330, 333 (7th Cir. 1988). Third party beneficiaries generally are subject to defenses that the promisor could raise in a suit by the promisee. *See generally* J. Calamari & J. Perillo, *The Law of Contracts* § 17-8, at 623-24 (2d ed. 1977). That is, they step into the shoes of the promisee. Collective bargaining agreements, however, are an exception to this general rule.

See Lewis v. *Benedict Coal Corp.*, 361 U.S. 459, 468-69 (1960). In *Benedict Coal*, the Court held that an employer could not raise the union's breach of the collective bargaining agreement as a defense against an employee benefit plan suing for delinquent contributions unless the collective bargaining agreement preserved such a defense in "unequivocal words." *Id.* at 470-71.

In the wake of *Benedict Coal*, some employers seeking to escape their contribution obligations adopted a new strategy. Instead of arguing that the union had breached the collective bargaining agreement, they raised defenses going to the formation of the collective bargaining agreement such as fraud in the inducement. *See Gerber Truck*, 870 F.2d at 1152. Congress responded by adding section 515 to ERISA. Its stated purpose was to "permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186)." 126 Cong. Rec. 23,039 (1980) (remarks by Representative Thompson). This new provision was essential to the viability of employee benefit plans. The high costs associated with employer delinquency

> detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates.

Id. Simply put, benefit plans must be able to rely on the contribution promises of employers because plans must pay out to beneficiaries whether or not employers live up to their obligations. *See Gerber Truck*, 870 F.2d at

1151. For this reason, Congress placed employee benefit plans in a position superior to the original promisee, analogous to a holder in due course.

The courts of appeals that have construed section 515 have unanimously regarded it as a limitation on the defenses available to an employer when sued by an employee benefit plan. For example, an employer may not assert that the union orally agreed not to enforce the terms of the collective bargaining agreement, *see Gerber Truck*, 870 F.2d at 1154, that the employer was fraudulently induced to enter into the agreement, *see Trustees of Laborers Local Union #800 Health and Welfare Trust Fund* v. *Pump House, Inc.*, 821 F.2d 566, 568 (11th Cir. 1987); *Rozay's Transfer*, 791 F.2d at 775, or that no contract was formed because of unilateral or mutual mistake of fact, *see Connors*, 867 F.2d at 632-36; *see also Operating Eng'rs Pension Trust* v. *Cecil Backhoe Serv., Inc.*, 795 F.2d 1501, 1504-05 (9th Cir. 1986) (rejecting defense that no valid contract was formed due to lack of mutual assent). Our research has disclosed only two defenses recognized by the courts: (1) that the pension contributions themselves are illegal, *see Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 86-88 (1982), and (2) that the collective bargaining agreement is void (not merely voidable), *compare Operating Eng'rs Pension Trust* v. *Gilliam*, 737 F.2d 1501, 1503-05 (9th Cir. 1984) (employer who was not aware he was signing a collective bargaining agreement could raise defense), *with Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund* v. *Bjorklund*, 728 F.2d 1262, 1265-66 (9th Cir. 1984) (employer who knew he was signing collective bargaining agreement, but who was fraudulently induced to enter it, could not raise defense). *See generally Rozay's Transfer*, 791 F.2d at

773-74 (discussing *Gilliam* and *Bjorklund*). Thus, once an employer knowingly signs an agreement that requires him to contribute to an employee benefit plan, he may not escape his obligation by raising defenses that call into question the union's ability to enforce the contract as a whole. *Cf. Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the . . . language [of the United States Arbitration Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.") (footnote omitted).

B. *Defenses Raised by Brower's*

Brower's attempts to scale this mountain of adverse authority by arguing that its defense of abandonment means there is no valid collective bargaining agreement in existence, and defenses going to the very existence of the agreement are not prohibited by section 515. This argument is without merit for two reasons.

First, we are doubtful that an abandoned agreement must be deemed non-existent. Abandonment is an NLRB doctrine by which an outside union seeking to represent employees may defeat the claim of the employer and incumbent union that an existing collective bargaining agreement acts as a bar to the outside union's petition for representation. *See, e.g., Austin Powder Co.*, 201 N.L.R.B. No. 90, 82 L.R.R.M. 1272, 1273 (1973); *Raymond's, Inc.*, 161 N.L.R.B. No. 80, 63 L.R.R.M. 1363, 1364 (1966). In other words, an abandoned collective bargaining agreement will not bar the

outside union's petition because the NLRB "cannot honor that contract as one imparting sufficient stability to the bargaining relationship to justify [the NLRB's] withholding a present determination of representation." *Raymond's, Inc.*, 63 L.R.R.M. at 1364 (footnote omitted). Thus, an NLRB determination of abandonment means only that the "contract bar" rule will not apply. "The 'contract bar' doctrine is a prudential concept used by the Board for representational election purposes only." *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 172 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985). A determination that a contract does not bar an election "is not equivalent to a holding that for all purposes there is no valid written agreement." *Id.*

Second, assuming that abandonment means no valid written agreement exists, Brower's is not released from its obligation to the Funds because "nothing in ERISA makes the obligation to contribute [to a benefit plan] depend on the existence of a valid collective bargaining agreement." *Gerber Truck*, 870 F.2d at 1153. Lest there be any doubt on this point, we shall briefly return to the legislative history.

Representative Thompson, the manager of the legislation in the House, stated:

> Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) . . . . Cases such as *Western Washington Laborers-Employers Health and Security Trust*

> *Fund* v. *McDowell*, . . . 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, [488 F.Supp. 816 (D.D.C. 1980)], are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23,039 (1980).

Both *McDowell* and *Overhead Door* involved "pre-hire" agreements, which are agreements commonly executed by employers in the construction business. By signing a pre-hire agreement an employer agrees to abide by the terms of a collective bargaining agreement as soon as he hires his employees. At the time that these two cases were decided, pre-hire agreements were valid and enforceable only if a majority of the workers hired ultimately wished to be represented by the union. *See NLRB* v. *Local Union No. 103, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978).[3] The employers in *McDowell* and *Overhead Door* sought to escape liability to the benefit plans by arguing that their pre-hire agreements were invalid because the unions had failed to attain majority status, and therefore no obligation to contribute to the benefit plans existed. The benefit plans argued that the employers could not raise such a defense.

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3 In 1987, the NLRB overruled longstanding precedent and held that an employer may not repudiate a pre-hire agreement during the term of the contract. *See John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 109 S.Ct. 222 (1988).

Both courts permitted the employers to maintain their defenses and ruled in favor of the employers. The court in *Overhead Door* stated: "[The cases cited by the Funds] involved collateral defenses to enforcement of the agreements. The defense in the instant case, on the other hand, concerns the validity of the very agreement that sought to establish a contractual relationship between Funds and Overhead." 488 F.Supp. at 819. Brower's argument is identical to the one accepted in *Overhead Door* and *McDowell*, and Congress clearly intended to forbid it.[4] In light of this unmistakably clear legislative intent, we need not devote any separate discussion to Brower's argument that it may raise lack of majority status as a defense.

We recognize that the result in this and similar cases may seem quite harsh. Brower's now must contribute to the Funds without a preliminary determination that there exists a collective bargaining agreement that would be recognized as valid under labor-management relations law. Our task today, however, is merely to enforce Congress' desire that benefit plans be able to rely on the written agreements presented to them. We note that an employer's liability in this situation is not limitless because an employer is liable under section 515 only for the effective period of the collective bargaining agreement. *See Advanced Lightweight*, 484 U.S. at 548-49.

As noted above, the NLRB's determination that the most recent collective bargaining agreement between

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4 *Overhead Door* was subsequently reversed on other grounds. The Court of Appeals made note of the legislative history of section 515, but chose not to rely on the new statute because of a question regarding its retroactive effect. *See* 681 F.2d 1 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983). *McDowell* was reversed without opinion. *See* 673 F.2d 1341 (9th Cir. 1982), *cert. denied*, 461 U.S. 926 (1983).

Brower's and Local 814 is valid will shortly be reviewed in this Court. We agree with the district court, however, that the issues raised in that litigation have been legislatively removed from the present action. We note that a district court may, in its discretion, choose to stay its proceedings pending an NLRB determination with respect to the collective bargaining agreement if the stay would serve the interests of fairness, efficiency and judicial economy without impairing the legislative intent underlying ERISA section 515. *See, e.g., Painters' Pension Trust Fund* v. *Manganaro Corp.*, 693 F.Supp. 1222, 1224-25 & n.2 (D.D.C. 1988). Should this Court overturn the NLRB's decision, Brower's may seek appropriate relief from the district court's judgment. We express no opinion on whether any relief is available or on what form it might take because those issues are not before us. The Funds need not await the outcome of the litigation between Brower's and the union, however, because that is the precise evil that Congress sought to avoid in enacting ERISA section 515.

We have considered Brower's other contentions and find them to be without merit.

CONCLUSION

ERISA section 515, 29 U.S.C. § 1145, prohibits Brower's from raising as a defense either the union's abandonment of the collective bargaining agreement containing Brower's promise to contribute to the Funds, or the union's alleged lack of majority status. The judgment of the district court is affirmed. The Funds are entitled to recover reasonable attorney's fees and costs incurred in defending this appeal. 29 U.S.C. § 1132(g)-(2)(D).

APPENDIX B

CV 88-0470
MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR, as TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,

Plaintiffs,

against-

BROWER'S MOVING & STORAGE, INC.

Defendant.

----------X

Appearances

For Plaintiff:

Michael Barrett, Esq.
Friedman, Levy-Warren & Moss
1500 Broadway
New York, NY 10036

For Defendant:

Robert S. Nayberg, Esq.
Law Office of Martin H. Scher
One Old Country Road
Carle Place, NY 11514

DEARIE, District Judge.

This action was brought under Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1145 and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, to collect contributions allegedly due and owing to employee benefit trust funds under a collective bargaining agreement concededly entered into between an employer and a union. Defendant employer challenges the enforceability of the collective bargaining agreement. Plaintiff moves for summary judgment on the ground that the delinquencies are established and that the employer's contract defenses are not assertable in a trust fund collection action. As explained below, the motion for summary judgment is granted.

FACTS

The Local 814 Pension, Annuity and Welfare Funds ("the Funds") are multi-employer employee benefit plans within the meaning of sections 3(3) and (3)(37) of ERISA, 29 U.S.C. § 1002(3) and (37). The Funds were established pursuant to the terms of various collective bargaining agreements between Teamsters Local 814 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers ("the Union") and various employers, including defendant Brower's Moving and Storage, Inc. ("Brower's"), a New York Corporation with its principal place of business in Port Washington, New York. The Funds are administered by two employer-designated trustees, two union trustees, and a court-appointed trustee in accordance with the terms of the collective bargaining agreements and the Funds' Agreement and Declaration of Trust ("Declaration").

It is undisputed that Brower's and the Union signed a series of collective bargaining agreements. The one which covers the period relevant to this action, April 1, 1983 through March 31, 1986, (the "agreement") was signed by Clifford W. Brower, an authorized agent of Brower's. The agreement by its terms requires Brower's to contribute to the Funds on a monthly basis on behalf of each covered employee of Brower's, based on the number of hours for which such employees were paid.

The agreement authorizes the Trustees of the Funds to take all actions necessary to effectuate the Funds' purposes, which include auditing employers to determine whether the required contributions have been made.[1] An audit of Brower's books on December 21, 1987 revealed that for the period April, 1983 through September, 1987, Brower's failed to contribute to the Funds on behalf of twelve of its employees for whom the collective bargaining agreement required contributions. The Funds have documented the deficiency, calculated pursuant to the terms of the agreement, in the amount of $239,693.30. On or about January 14, 1988, the Funds' office manager sent a notice of Audit Delinquency to Brower's, demanding payment of the unpaid contributions plus interest and liquidated damages in accordance with the agreement and the Declaration of Trust.[2] Upon Brower's failure to reply to the notice, the Funds initiated this action.

Brower's does not concede the amount of the deficiency, although it does readily acknowledge that over a period of time it "has not abided by the terms" of the agreement. Brower's principal argument is that although it has failed to comply with numerous terms of the agreement, the Union has essentially ignored the noncompliance.[3] According to

Brower's, (i) such failure to police the agreement amounts to abandonment, (ii) an abandoned agreement is invalid and unenforceable, and (iii) absent an enforceable collective bargaining agreement, Brower's has no obligation to contribute to the Funds. Brower's related argument is that the validity of the agreement is a subject within the exclusive jurisdiction of the National Labor Relations Board and that this Court therefore lacks jurisdiction over this entire action.

DISCUSSION

Section 515 of ERISA, 29 U.S.C. § 1145, provides that

> [e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The liability created by section 515 may be enforced by the trustees of a plan by bringing an action in federal district court pursuant to Section 502, 29 U.S.C. § 1132. Section 502(g), 29 U.S.C. § 1132(g), provides for the mandatory award of prejudgment interest, liquidated damages and attorneys fees to plans who prevail in collection actions against employers.[4]

The question presented in this case is whether the defense of abandonment of the collective bargaining agreement may be interposed by the employer in a Section 515 collection action. Although the question has not been addressed by our Court of Appeals, several other circuits have rejected the raising of various contract defenses in delinquent contribution

cases under ERISA. *See, e.g., Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989); *Bituminous Coal Operators' Association, Inc. v. Connors*, 867 F.2d 625 (D.C. Cir. 1989); *Trustees of Colo. Statewide Ironworkers Fund v. A&P Steel, Inc.*, 812 F.2d 1518, 1522 (10th Cir. 1987) (frustration of purpose defense rejected); *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 773 (9th Cir. 1986, *cert. denied*, 479 U.S. 1065 (1987) (trustees entitled by Section 515 to enforce the terms of an agreement even where agreement rescinded because employer fraudulently induced by union); *Southern Calif. Retail Clerks Fund v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984) (fraud in the inducement defense rejected). *See also Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (defense of breach of contract rejected).

Representative of these cases is the reasoning of the District of Columbia Circuit in *Connors*. As that court explained, an employee benefit plan such as the one involved here is a third party beneficiary of the collective bargaining agreement between the employer and the union. Thus, under traditional contract law, the benefit plan would step into the shoes of the union (promisee) and therefore be subject to any claim or defense that the promisor (employee) would have against the union. A pension fund, however, "is 'not a typical third party beneficiary' [but,] [l]ike Cinderella's stepsisters, it does not fit comfortably into the shoes of the promisee." 867 F.2d at 632 (citation omitted).

This misfit is no accident. Multiemployer employee benefit plans are something of the darlings of Congress. The legislative history of ERISA, and Section 515 in particular, has been extensively reviewed by numerous other courts, *see Connors*,

867 F.2d at 632-33, including the Supreme Court, *see Laborers Health & Welfare Trust Fund v. Advanced Lightweight Court Co.*, 484 U.S. 539 (1988), and need not be repeated here. As all these courts have agreed, in Section 515 Congress "provided a statutory procedure intended to simplify the collection of pension contributions and to insulate the plan's entitlement to employer contributions from any potentially offsetting claims against the union." 867 F.2d at 632-33.

The *Connors* Court also expressly rejected the employer's suggestion that Section 515 created a duty to contribute that is merely coextensive with the contractual duty or that Section 515 collection actions could be defeated by contract defenses. 867 F.2d at 633-34. Employers are of course not required to create a pension plan, but once they execute a collective bargaining agreement that does create one there can be virtually no repudiation of the pension promise. The executed collective bargaining agreement contains a promise to contribute on which plans immediately rely, as they determine the level of benefits they promise to pay to employees based on the promised employer contributions. Federal pension law protects a plan's right to rely and enables its trustees to enforce the promise to contribute without participating in or awaiting the outcome of litigation between labor and management.

There can be no dispute that Congress intended to narrow substantially the scope of defenses available to employers in collection actions. Although Brower's defense—abandonment of the contract—has not been specifically addressed in any of the reported Section 515 cases, the consistent and unequivocal rejection of employer's assertion of comparable contract defenses compels only one result here. This Court concludes that Brower's may not assert in this action defenses going to

the enforceability of the collective bargaining agreement between it and the Union.[5] Brower's executed the agreement on which the Funds are entitled to, and indeed must, rely. In terms of Section 515, there can be no question that Brower's is obligated under the terms of the agreement to contribute to the Funds.

Defendant's two additional arguments are easily dismissed. Defendant argues that since the 1983-1986 collective bargaining agreement has by its own terms expired, the Funds can no longer sue for delinquent payments. Defendant relies on, but completely misreads, *Laborers Health & Welfare Trust Fund v. Advanced Light Weight Court Co.*, 484 U.S. 539 (1988). That case held that Section 515 does not impose upon employers an obligation to contribute to a pension plan beyond the period covered by the collective bargaining agreement. Thus, the case is utterly inapposite, as the Funds are here suing only for amounts due during the years covered by the agreement (1983-1986). In other words, an employer does not escape its obligation for *delinquent* payments merely because the collection action is commenced at a time not covered by a collective bargaining agreement.

Defendant's challenge to this Court's jurisdiction is similarly dismissed. Defendant bootstraps a challenge to this Court's jurisdiction onto its assertion of defenses going to the validity of the collective bargaining agreement. Essentially, defendant argues that a factual predicate to plaintiff's ERISA claim is the existence of a valid agreement. Thus, defendant argues, the jurisdiction authorized by ERISA for collection actions does not exist until the validity of the contract is established. The only other arguable basis for this Court's jurisdiction, according to defendant, is § 301(a) of the LMRA,

which defendant argues in unavailable.

Defendant's understanding is seriously flawed. First, Section 502(e) of ERISA, 29 U.S.C. § 1132(e), unequivocally gives this Court subject matter jurisdiction over this collection action.[6] Even assuming, *arguendo*, that this Court needed separate jurisdiction to resolve the threshold factual question —whether a valid collective bargaining agreement existed—section 301(a) of the LMRA would be the necessary grant. That section provides, in pertinent part, that a federal district court has jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce..." 29 U.S.C. § 185(a). Relying on a line of cases construing the language of Section 301 literally and narrowly, defendant argues that a federal district court has jurisdiction only over suits for *violation* of contracts, but not for determinations of the validity of a contract where validity is the ultimate issue. *See, e.g., NDK Corporation v. Local 1550 of the United Food & Commercial Workers International Union*, 709 F.2d 491, 493 (7th Cir. 1983); *Leskiw v. Local 1470, International Brotherhood of Electrical Workers*, 464 F.2d 721 (3d Cir.), *cert. denied*, 409 U.S. 1041 (1972); *Hernandez v. Nat'l Packing Co.*, 455 F.2d 1252 (1st Cir. 1972). Most circuits, however, have rejected defendant's argument, holding that § 301(a) extends to suits concerning the existence or validity of an agreement. *See IBEW, Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inc. v. Int'l Union, UAW*, 856 F.2d 579 (3d Cir. 1988), *cert. denied*, —U.S. —, 109 S. Ct. 1316 (1989); *Rozay's Transfer v. Local Freight Drivers Local 208*, 850 F.2d 1321, 1325 (9th Cir. 1988); *McNally Pittsburg, Inc. v. Int'l Ass'n of Bridge; Structural & Ornamental Iron Workers*, 812 F.2d 615, 617-19 (10th Cir. 1987); *Bd. of Trustees,*

Container mechanics Fund v. Universal Enterprises, Inc., 751 F.2d 1177, 1184 (11th Cir. 1985); *United Steelworkers of America v. Rome Indus., Inc.*, 437 F.2d 881, 881-883 (5th Cir. 1970). In addition, the only two district court decisions in this Circuit to address the issue have agreed with the majority view. *See Kozera v. Electrical Contractors, Local 501*, 714 F. Supp. 644, 648 (S.D.N.Y. 1989) (Sprizzo, J.); *Messinger v. Building Contractors Ass'n, Inc.*, 703 F. Supp. 320, 322 (S.D.N.Y. 1989) (Mukasey, J.). For the reasons set forth in Judge Mukasey's opinion, *see* 703 F. Supp. at 321-323, this Court concludes that under Section 301(a), a federal district court does have jurisdiction to decide the validity of a collective bargaining agreement. Thus, whether 301(a) jurisdiction were necessary to create 1132(g) jurisdiction or whether 1132(g) jurisdiction were broad enough to cover the issue, this Court is empowered to resolve the threshold factual question. As indicated earlier, because Brower's acknowledges executing the collective bargaining agreement covering the period 1983 through 1986, this Court easily concludes that a valid and enforceable agreement, containing a promise to contribute to the Funds, existed.

Finally, because the Funds are entitled to judgment in their favor for delinquent contributions of $239,693.30, Section 1132(g) requires defendant to pay to the Funds, in addition to the unpaid contributions, (i) the Funds' reasonable attorneys fees and costs of this action, (ii) prejudgment interest on the unpaid contributions and (iii) an amount equal to the greater of the interest on the unpaid contributions or liquidated damages provided for under the plan in an amount not in exess of 20% of the amount of the unpaid contributions.[7] There is no question that Section 502(g)'s remedies are *mandatory*, and entirely consistent with the purposes of Section 515 discussed

above. *See, e.g., Laborers Health & Welfare Trust Fund,* 108 S. Ct. at 836 ("Congress added these [i.e., Section 502(g)'s] strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts.")

CONCLUSION

Plaintiffs motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment for plaintiffs for unpaid contributions in the amount of $239,639.30.

This case is referred to Magistrate Caden for a report and recommendation on the amount of interest, attorneys fees and other sums to which plaintiffs are entitled under 29 U.S.C. § 1132(g).

SO ORDERED.

Dated: Brooklyn, New York
December 4, 1989

RAYMOND J. DEARIE
United States District Judge

FOOTNOTES

1/ Section 31(A) of the agreement provides that:

> The Board of Trustees of the Pension, Welfare and Annuity Funds are hereby empowered and authorized to make, interpret and apply such rules and regulations governing the conduct and operation of the Fund as they shall deem proper, in accordance with the Agreements and declarations of trust, including but not limited to the power to establish the amounts, form and methods of contributions to be paid to the Funds in order to maintain the Funds on solvent and sound actuarial basis, and to make all determinations of earned credits and benefits eligibility. In general, they shall have the full power to take such actions as are necessary to effectuate the purposes of the trusts.

Article V, Section 4 of the Declaration authorizes audits.

2/ As discussed *infra*, Section 502(g) of ERISA, 29 U.S.C. § 1132(g) provides:

> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.
>
> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce [section 515 of ERISA, 29 U.S.C. § 1145] in which a judgment in favor of the plan is awarded, the Court shall award the plan—

(a) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contribtuions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For the purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none is provided, the rate prescribed under section 6621 of Title 26.

As authorized by Section 502(g), Article V, Section 3 of the Declaration provides:

(a) In the case of an Employer that fails to make the contributions to the Funds for which it is obligated, in accordance with the terms and conditions of its obligation, the Trustees may bring an action on behalf of the Funds pursuant to sections 502(g)(2) and 515 of ERISA to enforce the Employer's obligation.

(c) In any action under subsection (b) in which judgment is awarded in favor of the funds, the Employer shall pay to the Fund:

(I) the unpaid contributions,

(II) interest on the unpaid contributions, determined at the rate of 18% from the date due to the actual date of payment,

(III) liquidated damages as provided in Section 502(g)(c) of ERISA,

(IV) reasonable attorney's fees and costs of the action, and

(V) such other legal or equitable relief as the court deems appropriate.

3/ Specifically, defendant contends that it has failed to comply with provisions concerning the hiring of union workers, vacation time and pay-scale requirements.

4/ See note 2, *supra*.

5/ Accordingly, the recent decision and order of the National Labor Relations Board ("NLRB" decision resolves) in *Brower's Moving & Storage, Inc.*, 297 NLRB No. 28 (1989) does not affect the result here. That decision resolves issues between the Union and Brower's, litigation from which Section 515 exempts the Funds. Moreover, litigation between the Union and Brower's is far from over: Brower's has informed the Court that review of the entire record in the case will likely be sought, either through a direct appeal to our Court of Appeals pursuant to 29 U.S.C. § 160(e) or by NLRB petition for enforcement of its order

pursuant to 29 U.S.C. § 160(c). As discussed earlier in this opinion, the Funds need not await those proceedings to collect on Brower's pension promise.

6/ Section 502(e) provides:

> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(e)(1).

7/ Under Section 502(g), "interest on unpaid contributions shall be determined by using the rate provided under the plan.

The Funds' Declaration of Trust provides for a rate of 18% from the date due to the actual date of payment.

JUDGMENT
CV 88-0470 (RJD)

FILED
IN CLERK'S OFFICE
U.S. N.Y.
JAN 19 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR AS TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,

Plantiffs,

–against–

BROWER'S MOVING & STORAGE, INC.,

Defendant.

----------X

A memorandum and order of Honorable Raymond J. Dearie, United States District Judge, having been filed on December 6, 1989 granting plaintiffs' motion for summary judgment; directing judgment be entered for plaintiffs for unpaid contributions in the amount of $239,639.30; and referring the case to Magistrate John L. Caden for a report and recommendation on the amount of interest, attorneys' fees, and

other sums to which plaintiffs are entitled under 29 U.S.C. § 1132(g), it is

ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment is granted; that judgment is hereby entered for plaintiff for unpaid contributions in the amount of $239,639.30; and that the case is referred to Magistrate John L. Caden for a report and recommendation on the amount of interest, attorneys' fees, and other sums to which plaintiffs are entitled under 28 U.S.C. § 1132(g).

Dated: Brooklyn, New York
January, 19, 1990

ROBERT C. HEINEMANN
Clerk of Court

SUPPLEMENTAL JUDGMENT
CV 88-0470 (RJD) (JLC)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR AS TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,

Plantiffs,

–against–

BROWERS MOVING & STORAGE, INC.,

Defendant.

----------X

An order of Honorable John L. Caden, United States Magistrate, having been filed on February 14, 1990 awarding plaintiffs the amount of $367,020.22 for interest and liquidated damages, plus $14,408.50 for attorney's fees, for a total judgment in the amount of $381,428.72, it is

ORDERED AND ADJUDGED that plaintiffs are awarded

the amount of $367,020.22 for interest and liquidated damages, plus $14,408.50 for attorneys' fees, for a total judgment in the amount of $381,428.72.

Dated: Brooklyn, New York
February 14, 1990

ROBERT C. HEINEMANN
Clerk of Court

APPENDIX C

297 NLRB No. 28
SCH
D—1027
Port Washington, NY
RECEIVED
NOV. 10 1989
FRIEDMAN & LEVY-WARREN

Case 29—CA—13733

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWER'S MOVING & STORAGE, INC.

and

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On April 11, 1989, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the Acting General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with the Decision and Order.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by repudiating and failing to honor the terms of its collective-bargaining agreement with the Union and by failing to make the required contributions to the Teamsters Local 814 Welfare, Pension and Annuity Funds (the Funds), covering the employees in the following appropriate unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed at the Respondent's warehouse, excluding guards and supervisors as defined in Section 2(11) of the Act.

The judge dismissed the complaint. Relying primarily on *Ace-Doran Hauling & Rigging Co.*[2] and *McDonald's Drive-In Restaurant*,[3] the judge found that the collective-bargaining agreement between the parties did not give rise to a presump-

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[1] We shall set forth the facts that the judge failed to mention, which support asserting jurisdiction over the Respondent. The Respondent, a New York corporation with an office and place of business at its warehouse located at 18 Avenue A, Port Washington, New York, is engaged in the warehousing, moving, and storage of household and commercial furniture and other items. The Respondent, during the 12-month period ending November 30, 1988, which is a representative period, in the course and conduct of its business had gross revenues in excess of $500,000. During the same 12-month period, the Respondent purchased and received at its warehouse goods and material valued in excess of $50,000 directly from sources located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] 171 NLRB 645 (1968).

[3] 204 NLRB 299 (1973). The judge also cited *Weber's Bakery*, 211 NLRB 1 (1974), and *Bender Ship Repair Co.*, 188 NLRB 615 (1971).

tion of majority status. He concluded that the agreement was invalid because the parties' practice under the agreement demonstrated that they did not intent to established a valid collective-bargaining relationship. We disagree with the judge's failure to find a violation for the following reasons.

The Respondent recognized the Union in 1951 after it demanded recognition. The Respondent admits signing successive collective-bargaining agreements over the years, although there were never any individual negotiations. Most recently, the Respondent agreed to be bound by the 1986 to 1989 collective-bargaining agreement between the Union and an employer association of which the Respondent is not a member. The agreement states that it covers employees classified as chauffeurs, warehousemen, packers, hi-low operators, checkers, and helpers. Although the Respondent has never established the specific job classifications described in the contract, it has employees who perform many of the functions included in those classifications.

It is undisputed that over the years the Respondent failed to honor and abide by the wage, holiday, vacation, union security, and other provisions of the successive agreements. There is no affirmative evidence that the Union was aware of these lapses other than failure to pay into the Funds until the instant unfair labor practice charge was filed. From 1951 to 1954 a union representative visited the Respondent's facility on a monthly basis to collect dues. No grievances were ever filed and no steward was appointed, and after 1954 no union representative visited the Respondent's facility.

Over the years the Union's Funds sent the Respondent monthly contribution remittance reports. Until 1968 the Re-

spondent made Fund contributions only on behalf of a few family members employed by the Respondent, despite the fact that the Respondent employed other individuals in the unit described in the contract. The Respondent had contributed to the Funds on behalf of Wesley Brower until 1956 when the Union informed him that, because he was an owner of the Respondent, he could not work on trucks with members of the bargaining unit.

In 1968, the Respondent contacted the Union about getting an employee "set up" with hospitalization coverage and other benefits. In March 1982 the Respondent paid the back dues and Fund contributions that the Union required in order for the employee to be eligible. The parties settled a 1981 suit brought by the trustees of the Funds for delinquent contributions for the period July 1975 to January 1981. In September 1987, the Respondent ceased making any Fund contributions. In December 1987, the Funds conducted an audit of the Respondent's payroll records and found a sizeable delinquency in contributions due from April 1983 through September 1987. The Funds regularly sent past due notices to the Respondent on a monthly basis showing delinquencies dating back to 1981. The Respondent did not respond to bills for the delinquency, and the Funds filed suit.

By letter dated October 14, 1983, the Union requested all employers with collective-bargaining agreements, including the Respondent, to submit an updated seniority list. This request was made pursuant to a provision of the collective-bargaining agreement. The Respondent replied by sending the Union a letter listing some family members who worked for it. At that time the Respondent also requested that the Union provide it with the dates of entry and years of credit for the

few family members that the Respondent had listed in its response. The Union responded by submitting this information to the Respondent. It appears that the Respondent, in actuality, employed more unit employees than those listed in its response and never informed the Union of the existence of these additional employees. On October 11, 1988, the Union filed the charge herein.

We find that since 1951, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit described in the complaint, which we find appropriate for collective bargaining, and that the Union has been recognized as such by the Respondent. Since 1951 such recognition has been embodied in successive collective-bargaining agreements between the Respondent and the Union, the most recent of which is effective by its terms for the period April 1, 1986, to March 31, 1989. The Respondent has repudiated and, by its own admission, failed to honor and abide by the wage, vacation, holiday, union security, and other provisions of its agreement with the Union. We find that, since April 11, 1988, by this conduct, the Respondent has violated Section 8(a)(5) and (1) of the Act. We further find that the Respondent has since April 11, 1988, violated Section 8(a)(5) and (1) by failing to make the contractually required contributions to the Union's Funds.[4]

We reject the Respondent's contention and the judge's finding that there is no valid collective-bargaining agreement and that the Union was not supported by a majority of the employees in an appropriate unit. We find that the cases relied on by the judge are distinguishable. As the judge noted, it is well-established in Board Law that an incumbent union generally

[4] *Mr. Clean of Nevada*, 288 NLRB No. 101 (May 11, 1988).

enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co.*, supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity "to warrant a finding that the contracts are ones to which a presumption of majority status can attach."[5] Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only.[6] Similarly, in *Bender Ship Repair Co.*, supra, the Board found a "patent ambiguity"[7] in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees.[8] In *McDonald's Drive-In Restaurant*, supra,[9] the Board adopted the judge's finding that the unit purported to be covered by the contract was ambiguous and that the union never bothered to enforce its contract.[10]

The aforementioned cases are distinguishable because the collective-bargaining agreement in this case suffers from no

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[5] 171 NLRB at 645.

[6] Id. at 646.

[7] 188 NLRB at 615.

[8] Id. at 616.

[9] 204 NLRB 299, 309 (1973).

[10] The judge also cited *Weber's Bakery*, supra. In that case the board adopted the judge's finding that, although the unit definition in the contract was adequate to support the contract's validity, the parties' practice under the agreement showed that they did not intend a real collective-bargaining relationship and, therefore, the presumption of majority status did not attach. The judge in *Weber's Bakery* found that the contract was a sham and that the Union acquiesced in, at most, token compliance with the contract.
211 NLRB at 12.

such infirmities. It clearly specifies the unit, and the judge specifically found it was not a "members only" contract. In addition, the Union has clearly taken affirmative steps to enforce its contract over the years. When the contract was first signed, a union representative went to the facility to sign up employees and thereafter visited monthly for 3 years to collect dues. In 1956 the Union sought to stop the Respondent's owner, Wesley Brower, from performing unit work. In 1968 the Union responded to the Respondent's request to sign up one of its employees and required that the Respondent comply with the contract by paying back dues and benefit contributions to the employee's date of hire. In 1983, the Union requested that the Respondent submit an updated seniority list. Moreover, the activity of the Funds in filing suit in 1981 and in auditing the Respondent's books and records in 1987 and instituting another suit for the delinquencies discovered is consistent with a finding that there was in existence a valid enforceable collective-bargaining agreement between the parties.

While no steward was appointed and no grievances filed, the Respondent admitted it never told its unit employees they were represented by the Union or that there was an applicable contract. Therefore, the employees were denied the knowledge necessary to seek assistance from the Union. And, as discussed earlier, the Union was also denied knowledge concerning the unit employees when it asked for it. The Union filed the charge herein in October 1988 and has actively pursued it.

Thus, we find that there is no evidence that the Union ever acquiesced in a repudiation of substantial portions of the contract or that the Union and the Respondent ever had an ar-

rangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship.[11]

Accordingly, we find that the 1986-1989 contract is valid and gives rise to an irrebutable presumption of majority status and that the Union has not abandoned its administration of the contract. We further find that the Respondent has violated Section 8(a)(5) and (1) of the Act by repudiating and failing to comply with the contract's terms and by failing to make the required Fund contributions.[12]

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[11] *KBMS, Inc.*, 278 NLRB 826, 846 (1986).

We note that the Respondent itself has engaged in conduct that is inconsistent with its position that there is no valid contract. It has signed successive agreements over a period of 36 years and paid dues and made benefit contributions pursuant to those collective-bargaining agreements for several employees over a substantial part of that time. In 1968 the Respondent called on the Union to sign up an employee so he could receive union benefits, and it complied with the Union's requirement to pay back dues and benefits for that employee so that employee would be eligible.

We also reject the Respondent's contention that the contract is not valid because the Union lacked majority status at the time of the initial recognition in 1951. The Board has held:

> [A]n employer may not defend against a refusal-to-bargain allegation on the basis that the original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful. Any such defense is barred by Section 10(b) of the Act.

Morse Shoe, Inc., 227 NLRB 391, 394 (1976), and the cases cited therein. *Mr. Clean of Nevada*, supra. Even if the initial recognition in 1951 were flawed, it is outside the 10(b) period, and the Resondent is precluded from attacking the current contract on that basis.

[12] *Mr. Clean of Nevada*, supra, *KBMS, Inc.*, supra; *Pioneer Inn & Pioneer Inn Casino*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

We reject the Respondent's contention and the judge's finding that the Union has abandoned the contract and the unit. As the Board stated in *Pioneer Inn*, supra at 1264:

> [T]he lack of any basis for finding the contract to be invalid calls into effect the long-established Board presumption of the Union's majority status during the term of the contract, irrespective of the degree to which the Union may or may not have been deficient in the adminis-

(Footnote continued)

Conclusions of Law

1. Brower's Moving & Storage, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

4. Since April 11, 1988, the Respondent has violated Section 8(a)(5) and (1) of the Act by repudiating and failing to honor or abide by the terms of its collective-bargaining agreement with the Union, and by failing to make the required Fund contributions.

5. The above-described violations of the Act constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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tration of that agreement.

To preserve the validity of a contract for contract bar purposes, a recognized union need only show that it is willing and able to represent the covered employees at the time its status is called into question. *Loree Footwear Corp.*, 197 NLRB 360 (1972); *Road Materials*, 193 NLRB 990, 991 (1971). There is no evidence that the Union is either unwilling or unable to represent the Respondent's employees covered by the contract.

The Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to honor and abide by the terms of its collective-bargaining agreement with the Union, to make the unit employees whole for any losses they may have suffered because of the Respondent's failure to abide by the terms of the agreement, for the period beginning April 11, 1988, to be computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and to remit the contributions required by the agreement for the period beginning April 11, 1988, to the Union's Funds, with interest to be computed according to the practice set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 126 fn. 7 (1979). The Respondent shall also reimburse its employees for any expenses ensuing from its failure to make contributions to the Funds, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

ORDER

The National Labor Relations Board orders that the Respondent, Brower's Moving & Storage, Inc., Port Washington, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and failing to honor and abide by the terms of its collective-bargaining agreement with the Union covering the employees in the following unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

(b) Failing to make pension, welfare, and annuity Fund contributions as required by its collective-bargaining agreement with the Union for the unit employees described above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and abide by the terms of its collective-bargaining agreement with the Union.

(b) Make whole all unit employees for any losses they may have suffered as a result of the Respondent's refusal to honor the terms of its collective-bargaining agreement for the period beginning April 11, 1988, in the manner described in the remedy section of this decision.

(c) Make whole the Union's Funds for any payments the Respondent failed to make for the period beginning April 11, 1988, in the manner described in the remedy section of this Decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursements due.

(e) Post at its Port Washington, New York facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 8, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate or fail to honor and abide by the terms of our collective-bargaining agreement with Local 814, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO covering the employees in the following unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

WE WILL NOT fail to make pension, welfare, and annuity Fund contributions as required by our collective-bargaining agreement with the Union for the employees described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union.

WE WILL make whole all unit employees for any losses they may have suffered as a result of our refusal to honor the terms of our collective-bargaining agreement from April 11, 1988, with interest.

WE WILL make whole the Union's Funds for any payments we failed to make from April 11, 1988, with interest.

BROWER'S MOVING & STORAGE, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 75 Clinton Street, Eighth Floor, Brooklyn, New York 11201-0001, Telephone 718-330-2862.

JD(NY)-30—89
Port Washington, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

Case No. 29-CA—13733

BROWER'S MOVING & STORAGE, INC.

and

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Carol L. O'Rourke, Esq. and **James J. Paulsen, Esq.** for the General Counsel
Michael Barrett, Esq., Friedman, Levy, Warren & Moss, for the Charging Party
Robert S. Nayberg, Esq. and Richard A. Ivers, Esq. Law Offices of Martin H. Scher, for the Respondent

DECISION

Statement of the Case

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard by me on February 9, 1989 in Brooklyn, New York. The Complaint and Notice of Hearing herein, which issued on November 30, 1988,[1] and was based upon an unfair labor practice charge filed on October 11 by Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, alleges that Brower's Moving & Storage, Inc., herein called Respondent, violated Section 8(a)(1)(5) of the Act by repudiating and failing to abide by its contract with the Union by, *inter alia,* failing to make pension fund, welfare fund and annuity fund contributions, as required by the contract, and by failing to comply with the contract's terms regarding wages, holidays, vacations and union security.

Upon the entire record, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

Therein being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] Unless indicated otherwise, all dates referred to herein relate to the year 1988.

II. Facts and Analysis

Respondent is engaged in the warehousing and moving and storage business and has maintained a collective bargaining relationship (of sorts) with the Union since 1951. At that time, Respondent recognized the Union and the Union delegate came to Respondent's facility and had a number of employees (principally members of the Brower family) join the Union. From that time until his death in 1954, the Union delegate came to the facility regularly to collect Union dues from these individuals. From 1954 until the visit of Peter Furtado (as discussed, *infra*) nobody from the Union ever visited the shop. Respondent never formally negotiated a contract with the Union, but, apparently, every few years executed a Memorandum of Agreement agreeing to be bound by an agreement entered into by the Union with one of the employer associations with which it negotiates, and to execute the printed contract as soon as it was available. The last such Memorandum of Agreement is effective April 1, 1986 through March 31, 1989.

During 1988, Respondent had a complement of from ten to twenty employees; this number does not include Dorothy Golden, bookkeeper and sister-in-law of the owners. It does include Clifford Brower, Secretary-treasurer of Respondent ("I take care of the books in the office and work around the warehouse just like everybody else"), Wesley Brower, President of Respondent and another owner with Clifford Brower, Gary Brower ("He drives a truck, he works around the warehouse, anything that has to be done"), Wesley Brower's son and John Brower, a truck driver and also Wesley Brower's son. Gary and John Brower each owns some stock in Respondent. Gary and John Brower are two of Respondent's four regular drivers; Respondent also employs people who do

packing and warehousing.

At least since 1967, the only two employees for whom Respondent has transmitted dues and contributions to the Union are Clifford and John Brower. Until about 1956, Respondent, contributed, as well, for Wesley Brower; at that time, a representative of the Union told him that he could not work alongside the other employees, and Respondent ceased transmitting dues and contributions to the Union on his behalf. In about 1967, Respondent contacted the Union and informed them that it had a driver in its employ for about nine years and that it had not been deducting or transmitting dues or contributions on his behalf; at that time, Respondent and the Union entered into an agreement for the Respondent to pay about $20,000 to the Union over eighteen months so that the employee would be eligible for benefits upon his retirement. Respondent made the final payment pursuant to this agreement in 1969. Prior to 1982, Respondent also made the required contributions for employee George Finley and, possibly, others.

In 1981, the trustees of the Union's Welfare, Pension and Annuity Trust Fund, herein called the Funds, sued Respondent in Supreme Court, Queens County for failing to pay to the funds the sum of $14,105 for the period July 1975 through January, 1981;[2] the lawsuit added an additional $7,500 as interest and attorney's fees. By a Stipulation entered into in March 1982, Respondent agreed to pay $19,000 to the funds over a period of about two years and said payments were made.

By letter dated October 14, 1983 "to All Employers" (in-

[2] It is not clear whether this lawsuit covered payments only for John and Clifford Browers, or whether it included payments for others, as well.

cluding Respondent) the Union, by Charles Martelli, its Secretary treasurer, wrote:

> In accordance with the requirements of Section 21(A) of the Collective Bargaining Agreement, it is expected that each Employer shall mail, to the Union's office, no later than November 15, 1983, an up-to-date seniority list, showing the date of original hire and the classification seniority date for all employees.
>
> The above requirement must be complied with without exception.

On the bottom of this letter, Clifford Brower wrote: "Charlie—Please check and see what year we got in the Union and how many years we have to our credit." Underneath, he listed his name together with John Brower. By letter dated November 28, 1983, Martelli stated: "Please be informed that we are in receipt of your seniority list and wish to inform you of the following information." The letter gave October 16, 1967 as date of initiation for both, Clifford and John Brower, together their pension credits.

Other than the above recited situations, and the Complaint filed in the United States District Court for the Eastern District of New York on February 11 (as more fully described, *infra*) the Union has never filed a grievance or court action against Respondent, nor did any Union representative ever appear at Respondent's facility to question Respondent's compliance with the contract even though the uncontradicted testimony establishes that Respondent did not comply with a vast majority of the contractual terms, including the following:

Article 1 (Wages)
Article 3 (Birthday Holidays)
Article 4 (Vacations)
Articles 5, 6 and 7 (Job Classifications)
Article 9 E (Pay for Meals and Lodging for Overnight Hauls)
Articles 11 and 12 (Conditions and Rates Paid Employees)
Article 13 (Union Security Clause)
Article 16 (Check-Off of Dues)
Article 17 (Shop Steward)
Article 21 (Seniority)
Article 23 (Death in Family)
Articles 29, 30 and 31 (Pension, Welfare and Annuity Fund)
Article 32 (Cost of Living Allowance)

More particularly (as regards the more important of these provisions) Respondent did not pay the wages as set forth in the contract or make the contributions to the Union's funds for any of Respondent's employees except for Clifford and John Brower. In addition, Respondent did not maintain a seniority list, did not notify the Union upon the hiring of new employees or after their thirty first day of employment, and never had any employee designated as a shop steward. As stated, *supra*, in about 1956 Wesley Brower was informed that, as an owner of Respondent, he could not work on the trucks with members of the Union. At that time, Respondent ceased making payments to the Union and the funds on his behalf, but he "...still worked on the truck next to whoever was there with me", without any complaints from the Union.

Beginning in January, the Union has sent Past Due Notices

("This will inform you that your monthly payment to the Teamsters Local 814 Pension, Welfare and Annuity Trust Funds as set forth below has not been received. This matter needs your immediate attention".) to Respondent stating that the delinquency period was 1981 through 1987; apparently, Respondent never responded to these notices. Rather, Respondent continued to make the required contributions to the Funds for Clifford and John Brower, at least, through the end of 1987.

On December 21, 1987, Peter Furtado, who, at the time, was an auditor for the Funds, audited Respondent's books pursuant to the Funds normal procedures. On January 14, the Funds sent Respondent a Notice of Audit Delinquency stating that Respondent had underpaid the Funds in the amount of $239,000 for the period April 1983 through September 1987; that amount, together with interest and "liquidated damages" of twenty percent brought the amount Respondent owed to $377,000. Payment was demanded within fifteen days; Respondent was informed that if payment was not made the matter would be turned over to the Funds' attorneys. On February 11, 1988, the Funds sued Respondent in Federal District Court in Brooklyn for $239,000 plus interest, liquidated damages and costs. Apparently, this matter has not yet reached the trial stage. Respondent has not paid this amount to the Union.

Respondent defends on three grounds: there is no contract, even if there were a contract, it has long since been abandoned by the Union, and, even if it has not been abandoned, after so many years of not enforcing the agreements, the Union is estopped from attempting to do so now.

The Board has long held that an incumbent union generally

enjoys a presumption of continued majority status (a prerequisite, of course, to a Section 8(a)(5) violation) during the duration of a collective bargaining agreement. *Pioneer Inn Associates, d/B/A Pioneer Inn* and *Pioneer Inn Casino*, 228 NLRB 1263; *Colson Equipment, Inc.*, 257 NLRB 78. An exception to this rule was set forth in *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 where the Board found that the contracts between the parties did not raise a presumption of regularity or that the union was the majority representative of the employer's employees.

> The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for union members only. The acquiescence of the Unions in Respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees (as ostensibly provided by the "contracts"), makes it clear that the parties did not believe that they were in true collective-bargaining relationships.
>
> Since the alleged agreements are not such as would give rise to a presumption of majority status, we find that the General Counsel has failed to sustain his burden of proof and therefore that the complaint should be dismissed.

See also *Bender Ship Repair Company, Inc.*, 188 NLRB 615, *Weber's Bakery*, 211 NLRB 1; and *Glenlynn, Inc.*, 204 NLRB 299, which stated at 309:

However, the Board has held that this presumption may not attach following the termination of the contract where the contract does not define the bargaining unit with sufficient clarity or where the practices thereunder demonstrate that the parties never intended to establish a real bargaining relationship.

Apart from the ambiguity thus surrounding the scope of the bargaining unit, the evidence leaves one highly skeptical that a real collective-bargaining relationship emanated from the execution of the Alton contract. As previously discussed, it is undisputed that the Union neither administered the contract nor serviced the employees. As a result, not only were the employees deprived of contractual benefits pertaining to such matters as wage rates, health and welfare contributions, meals, uniforms, job duties, and holidays, but they were subjected to working conditions unilaterally imposed by the Respondent without any protest from the Union. Moreover, whatever grievances or complaints they had they personally presented to, and discussed with, management and it was not until the closing days of the contract that the Union undertook to submit several employee grievances to the Company. In addition to the Union's indifference to employee interests, it did not bother to enforce them. Apparently, the Union was not content with the few employees the Respondent periodically signed up for the Union and with the initiation fees and dues the Respondent deducted from the wages of these employees. It was only near the end of the contract term that the Union took more affirmative steps to enlist the Respondent's assistance to force the employees to join.

> In sum, I find that the parties never entered into a true collective-bargaining relationship out of which a presumption of the Union's majority status may arise. At best, the relationship was a token one where "the Union was willing to exact little in the way of contract enforcement and ... [the Respondent was] never satisfied to reap the financial benefits of lower costs." In these circumstances, and in view of equivocal nature of the bargaining unit, I find the evidence insufficient to support a presumption that the Union was the majority representative of the employees in the alleged Alton store unit.

I cannot imagine a better example of the situation referred to in *Glenlynn* and *Ace Doran, supra,* as the instant matter. Respondent initially recognized the Union in about 1951 and about every three years the Union sent Respondent a Memorandum of Agreement to execute; by signing each of these, Respondent agreed to be bound by the contract the Union was to negotiate with an association. After Respondent agreed to recognize the Union in 1951 (without any majority support from Respondent's employees) the Union's subsequent activity (up until the December 1987 audit of Respondent's books and the subsequent filing of the Federal Court action in February) was as follows:

After Respondent recognized the Union, a representative of the Union came to the Respondent's facility and signed Clifford and Wesley Brower as Union members; it is not clear whether any other employee joined the Union at that time.

In 1967, Respondent contacted the Union and informed them that it wanted Merriweather, a driver in its employ for nine years, to be a member of the Union and covered by the Funds

so that he could receive a pension from the Union upon retirement. The Union determined the amount due it since Merriweather began his employment, with Respondent in 1959—almost $20,000—and Respondent paid this amount to Respondent.

In 1981, the Union funds sued Respondent for $14,000 delinquency in payments to the funds from 1975; a year later, this matter was settled when Respondent agreed to pay this amount in installments. This lawsuit involved only the annuity, welfare and pension funds not any other payments Respondent failed to make under the contracts.

In 1983 the Union requested all employers under contract to supply them with a seniority list; Respondent asked the Union for the seniority dates of the only two individuals who were members—Clifford and John Brower—and the following month the Union supplied them with their date of initiation into the Union—1967.

On a monthly basis (beginning in, at least, April 1986) transmitted to Respondent a combined Monthly Welfare, Pension and Annuity Contribution Report with only John and Clifford's name filled in; Respondent then listed forty hours for each, together with the amount due and a check to cover this amount. Between the 1981 lawsuit and the December 1987 audit, Respondent never questioned these reports.

The record clearly establishes that aside from the dues and fund payments for Clifford, and John Brower (and for a period, Merriweather and Wesley Brower) the contracts between the parties were totally disregarded; employees were not members of the Union as required by the union security

clause of the agreement nor did they receive the terms and conditions of employment as specified in the contracts. Rather, it appears that (with the exception of the 1981 lawsuit) between 1951 and December 1987, the Union did nothing to enforce its contract with Respondent. General Counsel, in her brief, cites *Mr. Clean of Nevada, Inc.*, 288 NLRB No. 101. However, that case is distinguishable from the instant matter because that bargaining relationship lasted only two years and four months and involved deception by the employer. In the instant matter, the parties had a collective bargaining relationship for thirty six years before the Union took any action to enforce the contract, and Respondent never engaged in any positive deceptions; it simply made believe that the contract did not exist.

The 1986 through 1989 contract therefore does not give rise to a presumption of majority status, *Ace-Doran, supra*, I therefore find that the General Counsel has failed to sustain her burden of proof and accordingly recommend that the Complaint be dismissed.[3]

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[3] Although I have recommended that the Complaint be dismissed on this ground, two other theories—members only and abandonment—should be mentioned. In *Don Mendenhall, Inc.*, 194 NLRB 1109 the Board refused to find a Section 8(a)(5) violation because the agreement between the company and the union was applied to members only. Members only is not applicable to the instant situation because the contract did not even cover the terms and conditions of employment of the only two members—John and Clifford Brower; it only covered them for the annuity, pension and welfare funds. On the other hand, I cannot imagine a clearer case of abandonment by a union; in the situation herein, the Union (as differentiated from the trustees of the Funds) made no attempt to enforce the provisions of its agreements with Respondent for approximately thirty six years. To me, this indicates an "unwillingness to represent the employees in the unit." *Road Materials, Inc.*, 193 NLRB 990 at 991. See also *Industrial Paper Stock Company*, 66 NLRB 1185. I would therefore recommend the dismissal of this Complaint for that reason, as well.

Conclusions of Law

1. Brower's Moving & Storage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1)(5) of the Act as alleged in the Complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[4]

It having been found and concluded that Respondent, Brower Moving & Storage, Inc., has not engaged in unfair labor practices as alleged, the Complaint is hereby dismissed in its entirety.

Dated: April 11, 1989

Joel P. Biblowitz
Administrative Law Judge

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX D

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

- - - - - -

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of August, one thousand nine hundred and ninety.

PRESENT:
HONORABLE WILFRED FEINBERG
HONORABLE RICHARD J. CARDAMONE
Circuit Judges
HONORABLE JOSE A. CABRANES*
District Judge

UNITED STATES COURT OF APPEALS
FILED AUG 29 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

90-4031

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*Honorable Jose A. Cabranes, United States District Judge for the District of Connecticut, sitting by designation.

----------X

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

LOCAL 814, AFIILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Intervenor,

against

BROWER'S MOVING & STORAGE, INC.

Respondent,

----------X

Petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the application of the National Labor Relations Board for enforcement of its Decision and Order, dated November 8, 1989, and was briefed and argued by counsel.

UPON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed that the order of the Board be and it hereby is ENFORCED.

1. The National Labor Relations Board seeks to enforce its order, dated November 8, 1989, against Brower's Moving and

Storage, Inc., a Port Washington, New York business, which, among other things, directed Brower's to comply with the terms and conditions of its 1986-89 collective bargaining agreement with Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The Board decided, in disagreement with the ruling of the Administrative Law Judge, that Brower's violated Section 8(a)(5) and (1) of the National Labor Relations Act by repudiating the terms of its collective bargaining agreement with the Union and by failing to make the contractually required contributions to employee Welfare, Pension and Annuity Funds since April 11, 1988. It should be noted that this Court recently affirmed the grant by the United States District Court for the Eastern District of New York of summary judgment against Brower's in an action by the Trustees of the Funds, ordering Brower's to make unpaid pension contributions to the Funds. Benson, Corbett, Eisenberg, Morgan & O'Connor v. Brower's Moving & Storage, Inc., No. 90-7001 (2d Cir. June 18, 1990).

2. Citing such cases as NLRB v. Marine Optical Associates, 671 F.2d 11, 16 (1st Cir. 1982), Pioneer Inn Associates v. NLRB, 578 F.2d 835, 838-39 (9th Cir. 1978) and NLRB v. Marcus Trucking Co., 286 F.2d 583, 592-93 (2d Cir. 1969), the Board argues that Brower's was not legally justified in challenging the incumbent Union's majority status and dishonoring its agreement because, during the term of a collective bargaining agreement of three years or less, the incumbent union is entitled to a presumption of majority status. The Company apparently does not dispute this proposition; instead, relying principally on Ace-Doran Hauling & Rigging Co., 171 NLRB 645, 646 (1968), it claims that his presumption does not apply here because the conduct and practice of

the parties shows that they did not intend their agreement to function as an effective collective bargaining contract. Brower's alleges that the Union's actions subsequent to its initial agreement in 1951 indicate that the Union either abandoned the contract or acquiesced in the Company's repudiation of it. The Board, however, found on the record before it that the parties' conduct over a period of years did not negate the intent to form a valid collective bargaining agreement or establish that the Union abandoned the contract or acquiesced in repudiation of it.

3. We find that the Board's findings of fact are supported by substantial evidence on the record as a whole and therefore must be affirmed. The Board made a number of findings confirming the parties' intent to form a valid, ongoing collective bargaining relationship, including the Company's assent to successive agreements over a period of many years, its payment of dues and contributions for several employees over a substantial period of time and the Union's efforts on behalf of employees in a number of instances to secure affirmative compliance with the contract.

4. We have considered all of the Company's arguments and find them without merit. We grant the Board's application to enforce its order.

WILFRED FEINBERG

RICHARD J. CARDAMONE
Circuit Judges

JOSE A. CABRANES,
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

No. 90-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWER'S MOVING & STORAGE, INC.,
Petitioner,

— v. —

C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR, as TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

EUGENE S. FRIEDMAN
Counsel of Record

MICHAEL BARRETT
FRIEDMAN & LEVY-WARREN
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New York, NY 10036
(212) 354-4500

Attorneys for Respondents

ALTERNATIVE STATEMENT OF QUESTION 1

In an action brought by Trustees of employee benefit funds pursuant to Section 515 of ERISA, may an employer assert defenses based on (a) the union's abandonment of the collective bargaining agreement in which the agreement to contribute is contained, or (b) the union's lack of majority status at the time the agreement was entered into?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

-continued-

STATUTES

OTHER AUTHORITIES

LEGISLATIVE MATERIALS

STATEMENT OF THE CASE

The instant action is one to collect delinquent contributions to employee benefit plans promised in two consecutive collective bargaining agreements between the petitioner Brower's Moving & Storage, Inc. ("Brower's") and Local 814, International Brotherhood of Teamsters ("Local 814" or "the Union"). The first of these agreements was effective April 1, 1983 through March 31, 1986, and the second April 1, 1986 through March 31, 1989. It is undisputed that the first agreement was executed by Clifford W. Brower (Appendix B to Brower's Petition at 3), and that Brower's entered into the second agreement by the execution of a Memorandum of Agreement. Appendix C at 17; Petition at 7.

The action was brought pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, ("ERISA") 29 U.S.C. §§1132 and 1145, by the Trustees of the Local 814 Pension, Annuity and Welfare Funds ("the Funds"). See Petition at 3-4. As an alternative to the ERISA claim, the Funds also asserted a claim under Section 301 of Labor Management Relations Act, 29 U.S.C. §185. See Petition at 4-5.

Brower's consistently implies that the defenses it sought to raise show that it "never agreed to the obligation" to contribute to the Funds or that "the promise did not exist." See, e.g. Petition at 14-15. However, it is undisputed that Brower's knowingly executed documents which contained promises to contribute to the Funds.

Petition at 7. Brower's defenses of abandonment of these executed agreements by the Union and lack of majority status at the time the agreements were made, may go to the issue of the enforceability of such agreements, but not to the fact that Brower's knowingly entered into them in the first place.

Brower's Statement of the Case also gives insufficient attention to the decision of the National Labor Relations Board concerning the unfair labor practice charge filed by the Union. That decision, which was enforced by the Court of Appeals for the Second Circuit, all but renders moot the issues Brower's would present to this Court.

The Board has held that the 1986-1989 collective bargaining agreement between Brower's and the Union, one of the

two agreements upon which the Funds relied in the instant action, "is valid and gives rise to an irrebutable presumption of majority status and that the Union has not abandoned its administration of the contract." Appendix C at 8. This decision was rendered by the Board on November 8, 1989 and was enforced by the Court of Appeals for the Second Circuit on August 29, 1990. Appendix D.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Question of Whether Brower's Should Be Allowed to Raise Defenses of Abandonment and Lack of Majority Support Is Not an Important Question of Federal Law

Brower's contends that this case raises the general issue of whether an employer may defend an action to collect delinquent contributions brought pursuant to Section 515 of ERISA on the grounds that the underlying collective bargaining agreement is invalid or unenforceable. However, the only two defenses Brower's attempted to raise below -- abandonment of the agreement and lack of majority support of the union -- are based on the unique factual circumstances of this case and therefore lack general significance.

A claim of abandonment requires the complete disregard of an existing

collective bargaining relationship by a recognized or certified union. See, e.g., Paramount Press, Inc., 187 NLRB 586 (1970). Similarly, Brower's claim of lack of majority support can only succeed if "both parties' practice under the agreements showed that the parties did not intend them to be effective collective bargaining agreements," thereby falling into "a narrow exception to general rule" that majority status is presumed to exist during the term of a collective bargaining agreement. NLRB Decision, Appendix C at 6.

Brower's has not indicated a single prior instance in which either defense has been raised in a Section 515 action in the ten year period since Congress enacted the statute. Thus, Brower's cannot claim that resolution of

the question of whether it can raise such defenses in a Section 515 action is of general significance.

Moreover, the Second Circuit recognized that Brower's purported "abandonment" defense does not even address the question of an agreement's validity or enforceability outside the specific National Labor Relations Board context from which it arises:

> Abandonment is an NLRB doctrine by which an outside union seeking to represent employees may defeat the claim of the employer and incumbent union that an existing collective bargaining agreement acts as a bar to the outside union's petition for representation... A determination that a contract does not bar an election "is not equivalent to a holding that for all purposes there is no valid written agreement."

Appendix A at 12 (citations omitted). The Petition does not seek review of this

holding by the Second Circuit, which independently resolves the abandonment defense. This Court only reviews issues not raised in a timely petition in extraordinary circumstances. 13 Moore's Federal Practice ¶810.41 (1990)

In any event, the rejection of Brower's defenses rests on the routine application of settled federal law. Brower's concedes that every circuit court of appeals which has addressed the issue has held that employers may not raise defenses that merely call into question a union's ability to enforce the contract generally. See, e.g., Central States Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989) (rejecting defense that subsequent oral agreements and correspondence had superseded or terminated collective

bargaining agreement); Central States Pension Fund v. Behnke, 883 F.2d 454 (6th Cir. 1989) (same); Bituminous Coal Operators' Association v. Connors, 867 F.2d 625 (D.C. Cir. 1989)(rejecting defense that contract is invalid as the result of unilateral or mutual mistake of fact); Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769 (9th Cir.), cert. denied., 479 U.S. 1065 (1987) (rejecting challenge to contract's validity based on fraudulent inducement); Trustees of Laborers Local Union #800 Health and Welfare Trust Fund v. Pump House, Inc., 821 F.2d 566 (11th Cir. 1987)(same).

None of the cases cited above dealt specifically with an abandonment or a "lack of majority" defense. However, such defenses, at best, go to the general

enforceability of the agreement by the union, and are therefore squarely within the scope of the defenses rendered irrelevant by Section 515. The Gerber Truck court, after an exhaustive analysis of the legislative history and policy implications of Section 515, summarized the effect of the provision:

> If the contract provides for the commission of unlawful acts, it will not be enforced. Kaiser Steel Corp. v. Mullins, 455 U.S. 72... If the employer simply points to a defect in its formation - such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law - it must still keep its promise to the pension plans.

Gerber Truck, supra, 870 F.2d at 1153.

Defenses based on labor laws in general, and on lack of majority support

in particular, are defenses that Congress most clearly intended to bar in an ERISA collection action. Representative Thompson, the floor manager of the legislation which added Section 515 to ERISA, stated that Section 515 was intended to "permit trustees of plans to recover delinquent contributions efficaciously and without regard to issues which might arise under labor-management relations law--other than 29 U.S.C. 186" (a section not relevant here). 126 Cong. Rec. 23039 (1980). As the Second Circuit noted, Representative Thompson, specifically identified two district court opinions upholding "lack of majority support" defenses to fund contribution actions as decisions the legislation was intended to correct. Appendix A at 12-14. Accordingly, the Second Circuit rejected the defense "in light of this unmistakably clear legislative intent." Id. at 14.

Moreover, the Supreme Court has already addressed the general issue of defenses available in fund collection actions in two prior decisions which form the foundation of the circuit court opinions cited above. In Lewis v. Benedict Coal Corp., 361 U.S. 459, 464-466 (1960), this Court held that an employer may not assert a union's breach of the collective bargaining agreement as a defense to a fund's suit for breach of the provision of the agreement requiring contributions to the fund. Lewis was decided before the passage of Section 515 and was one of the cases Rep. Thompson expressly approved as a model for what Section 515 was intended to achieve. Appendix A at 12.

In Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86-88 (1982), this Court held

that a defense which claims that the agreement to contribute to a fund was unlawful survived the passage of Section 515. However, the Court noted the same legislative history relied on by the lower courts here, and the other courts of appeals, and carefully limited its holding to defenses "based on the illegality of the very promise [to contribute to the fund] sought to be enforced." Id. at 88.

The decision of the Second Circuit here is completely consistent with these prior decisions of this Court. Brower's defenses of abandonment and lack of majority status are not analogous to a claim that its agreement to contribute to the Funds is unlawful. At best these defenses go to conduct of the Union analogous to a breach of the agreement by the Union which is unrelated to the agreement to contribute in the Funds.

Finally, Brower's defenses are all but rendered moot by the findings of the NLRB and the Second Circuit in the Union's unfair labor practice case that the 1986-1989 agreement is valid and enforceable. Appendix C at 8; D at 4. Brower's is now precluded from relitigating this issue in the Funds' federal court action. United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966); Wicksham Contracting Co. v. Board of Education New York, 715 F.2d 21 (2d Cir. 1983). Even though the Funds were not a party to the NLRB action, the findings of the NLRB may be applied to estop Brower's. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Thus, unless Brower's seeks a writ of certiorari in the NLRB case, and the Court grants the writ and reverses the NLRB and the Second Circuit on this issue, Brower's has

already lost on the merits of the defenses it is now seeking an opportunity to present.

II.

No Important Issues Are Raised By Brower's Frivolous Arguments that ERISA Does Not Provide Subject Matter Jurisdication of This Action and That the Courts Must Defer to the National Labor Relations Board on the Issue of the Agreement's Validity

Brower's argues that ERISA does not grant the federal courts "jurisdiction" to resolve the issue of the enforceability of the collective bargaining agreement by the Funds and that the issue must be deferred to the NLRB. These arguments are frivolous and do not warrant further review.

The Second Circuit did not find it necessary to address these claims in detail, but summarily rejected them.

Appendix A at 15. The district court described the lack of jurisdiction argument as "seriously flawed" and determined that the deferral to the NLRB was not required because the defenses Brower's would raise there were irrelevant. Appendix B at 8 and 13 n.5.

A. The federal courts have subject matter jurisdiction under ERISA to determine the validity of agreements.

Any argument that federal courts lack subject matter jurisdiction over delinquent contribution actions brought pursuant to ERISA is directly contrary to the plain meaning of the statute. Section 502(e)(1) of ERISA grants federal district courts exclusive jurisdiction of civil actions, other than by a beneficiary to recover a benefit, brought under

Subchapter I of ERISA. 29 U.S.C. §1132(e)(1), Petition at 3.

Section 515 of ERISA, 29 U.S.C. §1145, is part of Subchapter I. Section 515 requires employers who are obligated under the terms of a collective bargaining agreement to make contributions to benefit plans to "make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. §1145. An action by fiduciaries of employee benefit funds to enforce Section 515 is a cause of action authorized by §502(a)(3) "to enforce any provision of this subchapter," and is thus squarely within the exclusive jurisdiction granted to federal courts pursuant to Section 502(e)(1).

The Trustees have asserted precisely this cause of action. The

Trustees alleged that they are fiduciaries of the Funds. The Trustees alleged that Brower's was obligated to make contributions to the Funds pursuant to two consecutive collective bargaining agreements which it executed, and that Brower's breached the agreements by paying less than the amount of contributions required by these agreements. Thus, the Trustees stated a claim for a violation of Section 515 and the district court had exclusive jurisdiction pursuant to Section 502(e).

Brower's asserts without explanation or citation to relevant precedent that the federal courts are without "jurisdiction" under Section 515 and 502 to decide the issue of the "validity" of the agreement which is alleged to be violated. The existence of

a collective bargaining agreement is merely one element of a Section 515 action, Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988), rather than a prerequisite for federal court jurisdiction to decide that issue. See generally, Bell v. Hood, 327 U.S. 678 (1946).

Contrary to Brower's assessment of the case, Advanced Lightweight, 484 U.S. at 545-549 and n. 15-16, does not hold that agreements to contribute are "presumed to exist," or that federal courts lack jurisdiction to consider their validity. On the contrary, it holds that the existence of an agreement to make the contributions is a necessary element to establishing liability under ERISA. This element is established here by the

unrebutted proof that Brower's executed the two agreements.

Notwithstanding the clear language of §502 of ERISA, Brower's apparently asserts that Congress intended that whenever a defendant in a Section 515 action denies the existence of the contract or raises an affirmative defense to the contract, and thereby puts the "validity" of the contract at issue, the federal court is without jurisdiction to proceed (apparently until the issue is decided in some other forum). As Brower's would have it, federal courts which have exclusive jurisdiction of Section 515 actions are in the unique position of being unable to proceed with the action because they lack jurisdiction to decide an essential element of such claims. Inasmuch as Congress enacted Section 515

with the express intent to simplify collection actions brought by trustees, Kaiser Steel Corp. v. Mullins, 455 U.S. at 86, it could not have required that trustees collect delinquent contributions by proceeding with two separate litigations, first seeking confirmation of the validity of the agreement in one forum, and then litigating issues of breach of the agreement and damages before the federal courts.

Federal court decisions after Kaiser Steel have routinely addressed and disposed of defenses going to contract validity in Section 515 actions whenever they have been raised. See cases cited supra at 8-9. On the other hand, Brower's has failed to cite a single case which even suggests that federal courts lack subject matter jurisdiction under Sections

515 and 502 to decide issues going to the validity of a collective bargaining agreement.

Morever, this issue is all but moot after the NLRB decision, because as described above, Brower's is precluded from relitigating the issue of the validity of the agreement.

B. The federal courts need not defer to the NLRB

The argument that deferral to the NLRB is necessary to avoid conflicting decisions is now moot because the NLRB held that the collective bargaining agreement was enforceable by the Union and directed that Brower's comply with the agreement, including making contributions to the Funds. This decision was enforced by the Second Circuit. Appendix D.

Accordingly, there is no longer any danger of conflicting results on the issue of the enforceability of the contract.

Moreover, even if the NLRB had determined that the contract was not enforceable by the Union in an unfair labor practice action, such a decision would not be binding on the Funds. The Funds have distinct legal rights from the Union, and are not bound by an adverse ruling in an action brought by the Union. Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3rd Cir. 1986), cert. denied 485 U.S. 904 (1988)(fund not bound by arbitration award involving employer and union). See, generally, Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984).

Furthermore, in a decision adverse to the Union, the NLRB could not decide

any issues relevant to Brower's liability to the Funds under ERISA. It is now well settled that, pursuant to Section 515, employee benefit funds have greater rights to enforce contribution obligations than do unions to enforce agreements generally. (See Point I, above). Once the existence of a written agreement to contribute has been proven, the only issue relevant to a Section 515 action which the NLRB might resolve is whether the provision requiring contributions is unlawful. Gerber Truck, supra, 870 F.2d 1148, 1153; Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1264 n. 2, 1265 (9th Cir. 1984). Brower's has not claimed that the provisions of the agreements requiring contributions to the Funds are illegal. Thus, there would be no inherent conflict between a court decision in favor

of the Funds and a Board decision adverse to the Union.

III.

The Question of the Federal Court's Jurisdiction Under Section 301 of the LMRA Is Irrelevant to the Instant Action

Brower's contends that the federal courts lack subject matter jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, to adjudicate the validity of a collective bargaining agreement as opposed to a breach of the agreement. This question is irrelevant to the instant action and will be rendered moot unless this Court grants review and reverses the Second Circuit on the questions involving the ERISA cause of action.

The claim for relief under Section 301 of the LMRA is merely an alternative

to the ERISA claim and was not a factor in the grant of summary judgment to the Funds. The district court addressed the LMRA claim in dicta and resolved it in favor of the Funds, but the Court of Appeals did not address the issue.

In any event, the federal courts' jurisdiction in Section 301 actions does not warrant review. Although Brower's points to a split in the circuits over whether courts have jurisdiction under Section 301 when the only question before the court is the validity of an agreement (Petition at 21-23), none of the circuits has held that they lack jurisdiction when, as here, both validity of the agreement and breach of the agreement are at issue.

The cases relied upon by Brower's make it plain that, where Section 301 jurisdiction has been rejected, it is

because the complaint sought only a declaration that the agreement at issue was either effective or ineffective. In each case, a claim for breach of the agreement was lacking.

For example, John S. Griffith Constr. Co. v. Southern Calif. Cement Masons, 607 F.Supp. 809 (C.D. Cal. 1984), does not hold, as suggested by Brower's, that federal courts do not have jurisdiction under Section 301 whenever the validity of the contract is put at issue. That case held that there is no such jurisdiction when validity is the only issue sought to be resolved. The plaintiff in John S. Griffith sought only a declaratory judgment on the issue of the validity of a pre-hire agreement. Id. at 811. It did not allege a breach of the contract. Id. at 813. The court held

merely that Section 301 was not available for such declaratory judgments on the "validity of contracts where validity is the ultimate issue." Id. at 812. It expressly distinguished cases where a breach of contract was also alleged, holding that, in such cases, Section 301 jurisdiction would exist. Id. The court recognized that the issues concerning the existence of a valid contract may well have been raised in such a case, but noted that "they would have been merely threshold issues reached by the court as it attempted to enforce the contract." Id. at 813. Thus, the case stands only for the proposition that federal courts will not entertain Section 301 actions which do not involve allegations of breach of contract.

Similarly, the court in A.T. Massey Coal Co. v. UMW, 799 F.2d 142, 146

(4th Cir. 1986), cert. den., 481 U.S. 1033 (1987), held that Section 301 "affords no....jurisdiction in the case of a declaratory judgment brought to show that there was no contract to which the companies were bound." The court recognized that where a plaintiff alleges a breach of a contract, jurisdiction is present under Section 301. Id. See also, Huessner v. Nat'l Gypsum Co., 887 F.2d 672, 675-76 (6th Cir. 1989)(where plaintiff merely challenges validity of contract and does not allege breach of contract, no Section 301 jurisdiction exists).

Because the Funds here have sought to remedy a breach of the collective bargaining agreements, Section 301 provides an alternative basis for the court's federal question jurisdiction.

Moreover, as the district court recognized, the trend is to extend Section 301 jurisdiction even to those actions where plaintiffs put only the validity of the contract at issue. See Appendix B at 8-9, and cases cited therein.

The courts' jurisdiction under Section 301 is not preempted by the exclusive jurisdiction of the NLRB for the same reasons discussed above at Point I, with respect to the court's ERISA jurisdiction. Even, if Brower's defenses of abandonment or lack of majority status are within the exclusive jurisdiction of the NLRB, only those defenses are precluded, not the Funds' cause of action. Glaziers & Glassworkers Union No. 767 v. Custom Glass Distributors, 689 F.2d 1339, 1343-1345 (9th Cir. 1982).

CONCLUSION

For all of the foregoing reasons, Brower's petition for a writ of certiorari should be denied.

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